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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH BERRY,

Appellant,

vs.

MICHIGAN RACING COMMISSIONER,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

NEIL H. FINK (P 13430)*
DAVID S. STEINGOLD (P 29752)
Attorneys for Appellant Joseph Berry
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

* Member of the Bar of the Supreme Court of the United States.

RENAISSANCE PRINTING, INC., 76 WEST ADAMS
8TH FLOOR, DETROIT, MICHIGAN 48226 (313) 964-3185

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QUESTION PRESENTED

WHETHER MICHIGAN COMPILED LAWS ANNOTATED §431.71, MICHIGAN STATUTES ANNOTATED §18.966 AND MICHIGAN HARNESS RACING RULE §431.62(b), WHICH CREATE AN IRREBUTTABLE PRESUMPTION OF FAULT ON THE PART OF A TRAINER OF HARNESS RACE HORSES WHENEVER A HORSE UNDER THE TRAINER'S CARE IS FOUND TO HAVE A PROHIBITED SUBSTANCE IN ITS SYSTEM, RESULTING IN LOSS OF LICENSURE AND DEPRIVATION OF LIVELIHOOD, ABRIDGES APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW.

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WHETHER MICHIGAN COMPILED LAWS ANNOTATED §431.71, MICHIGAN STATUTES ANNOTATED §18.966 AND MICHIGAN HARNESS RACING RULE §431.62(b), WHICH CREATE AN IRREBUTTABLE PRESUMPTION OF FAULT ON THE PART OF A TRAINER OF HARNESS RACE HORSES WHENEVER A HORSE UNDER THE TRAINER'S CARE IS FOUND TO HAVE A PROHIBITED SUBSTANCE IN ITS SYSTEM, RESULTING IN LOSS OF LICENSURE AND DEPRIVATION OF LIVELIHOOD, ABRIDGES APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW.

OPINIONS BELOW

The Order of the Michigan Supreme Court denying Appellant's Application for Leave to Appeal entered September 21, 1983, and the Order of the Michigan Supreme Court denying Appellant's Motion for Reconsideration entered February 28, 1984 (App. pp. 5a-8a) are not reported.

The Opinion of the Michigan Court of Appeals affirming the decision of the Wayne County Circuit Court (App. pp. 9a-18a), is reported at 116 Mich App 164, 321 NW 2d 880 (1982).

The Opinion of the Wayne County Circuit Court (App. pp. 19a-29a), is not reported. The original Opinion of the Michigan Racing Commission (App. pp. 30a-47a), is not reported.

JURISDICTION

Jurisdiction in this case is invoked under 28 USC §1257.2. This action is a direct appeal from a final judgment of the highest court in the State of Michigan from which a decision may be had in a case where the validity of a state statute and rule are drawn into question on the grounds of their being repugnant to the Constitution, and the decision appealed from is in favor of their validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution:

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The challenged state statute, MCLA §431.71, MSA §18.966(41), is set forth in full in the Appendix hereto. The pertinent portion of the challenged state statute is as follows:

> A person who is issued an occupational license as a trainer is responsible for and the absolute insurer of the condition of the horse who is entered to race for the person, corporation, firm, partnership, association, stable or other legal entity by whom the trainer is employed, except as prescribed by the rules promulgated by the Racing Commissioner under this act. MCLA §431.71(4); MSA §18.966(41)(4)

The challenged state regulation, Michigan Harness Racing Rule 431.62(b), is set forth in the Appendix hereto. The pertinent portion of the challenged state regulation is as follows:

> The trainer shall be responsible for and be the absolute insurer of the condition of the horses entered for his stable, regardless of the acts of third parties... Michigan Harness Racing Rule 431.62(b)(7).

STATEMENT OF THE CASE

This case involves the question of whether Michigan Compiled Laws Annotated Section 431.71(4) and Michigan Harness Racing Rule 431.62(b)(7) violate the due process clauses of the United States Constitution by creating an irrebuttable presumption of fault on the part of a trainer of harness race horses, resulting in a loss of licensure and livelihood.

The statute and rule involved are commonly known as Michigan's Insurer's Rule (hereinafter referred to as "MIR"), so-called because it makes trainers absolute insurers for horses under their care.

1. Joseph Berry is a trainer and owner of harness race horses. His business is chiefly in the State of Michigan where he runs a public stable, training harness race horses for various owners besides himself.

2. The instant suit arose in February of 1981, when, on two different occasions, Joseph Berry was the trainer of record for a horse which was found to have a prohibited substance in its urine. Following each of these incidents, a hearing was held by the stewards of the race track. Joseph Berry was not allowed representation by an attorney at these hearings. (App. 46a). Following each of the aforementioned hearings, Joseph Berry was suspended for 365 days, cumulatively resulting in a two year suspension of his occupational trainer's license. Without this license, he had no access to the barn area of the tracks where horses are stabled, trained, and otherwise cared for.

The suspensions given by the stewards were not premised on a finding of actual wrongdoing by Appellant, rather, they were based on the aforesaid MIR. (App. 44a).

3. Joseph Berry appealed his suspensions to the Office of the Racing Commissioner for the State of Michigan. A notice of hearing was sent pursuant to Michigan Compiled Laws Annotated Section 24.271(c), and a hearing was held on March 27, 1981. The hearing officer for the Racing Commission subsequently rendered an Opinion on April 2, 1981, accompanied by an Order of the Racing Commissioner affirming the suspension of Joseph Berry. The Opinion acknowledged that the record contained no facts which would indicate that Joseph Berry administered or conspired to administer the improper substance. (App. 44a). The Racing Commission declined to rule on Appellant's claim that the MIR is unconstitutional, taking the position that the Racing Commission is not authorized to determine the constitutionality of statutes

or rules. (App. 43a). In addition to affirming Joseph Berry's suspensions, the Racing Commissioner expanded the scope of the stewards' rule by barring him, not only from the barn area, but also from attending any race track in any capacity, even as a mere patron, thereby completely ostracizing him from the horse racing community.

4. The decision of the Michigan Racing Commission was appealed to the Wayne County Circuit Court. Pursuant to stipulation of parties, the matter was expedited for hearing, and on May 14, 1981, an Opinion issued from the Honorable Thomas J. Foley affirming the Racing Commissioner's ruling. (App. 19a-29a). Joseph Berry's claim that MIR is unconstitutional was rejected by the Court, which found that MIR created strict liability on the part of trainers, which was a proper exercise of the state's police powers, mandated by the strong public policy and interest of the State of Michigan in the regulation of pari-mutuel horse racing.

5. An appeal was taken to the Michigan Court of Appeals from the ruling of the Wayne County Circuit Court on May 28, 1981. On May 5, 1982, an Opinion issued from the Court of Appeals affirming in all respects the ruling of the Wayne County Circuit Court. (App. 9a-18a). The constitutional claims of Joseph Berry were each dealt with by the Court of Appeals. On the claim that MIR was unconstitutional for creating an irrebuttable presumption of fault, the Court acknowledged that due process forbids the adoption of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact and where the State has a reasonable alternative means of making the crucial determination. The Court felt, however, that the Insurer's Rule creates no presumption of trainer fault and does not concern itself with assigning fault, but rather requires the trainer

as a contingency of being licensed by the state to bear the responsibility for the horse's condition. (App. 10a). The Court of Appeals further ruled that due process was not violated by subjecting Joseph Berry to disciplinary action without a showing of wrongdoing, stating that due process does not require proof of guilty knowledge before punishment may be imposed. *United States v Balint*, 258 US 250 (1922); *Shevlin-Carpenter Co. v Minnesota*, 218 US 57 (1910).

6. On May 24, 1982, Joseph Berry, Appellant, sought leave to appeal in the Michigan Supreme Court. Joseph Berry's primary claim in his application was the unconstitutionality of MIR. On September 21, 1983, an Order issued denying Joseph Berry's application, the Michigan Supreme Court not being persuaded that the questions presented should be reviewed. (App. 5a-6a).

7. On October 10, 1983, Joseph Berry filed a Motion for Reconsideration in the Michigan Supreme Court. On February 28, 1984, Joseph Berry's motion was denied, Justice Levin dissenting. (App. 7a-8a).

8. Joseph Berry served 112 days of his suspension before a stay was issued on June 11, 1981. The suspension was stayed continuously from that time until March 22, 1984, at which time Joseph Berry resumed serving his suspension.

THE QUESTION IS SUBSTANTIAL

1. The Michigan Courts have found it constitutionally permissible to revoke Joseph Berry's occupational license, thereby depriving him of the right to practice his profession for a period of two years without any showing of wrongdoing on his part, because horses under his care were found to have

been administered an improper substance. Joseph Berry was conclusively presumed to be at fault pursuant to MIR. No exception is made in MIR where it is clear that the trainer had no knowledge or involvement in the administering of a prohibited substance, nor is any exception made where a third person is shown to be the culpable party. Upon a finding of a prohibited substance in a horse's system, an irrebuttable presumption arises that the trainer either administered the substance or so negligently cared for the horse that the prohibited substance was able to be administered. Absolutely no proof of fault is required, and proof of innocence is not a defense.

2. The effect of a two year suspension on Joseph Berry would be devastating. A suspension may cause a trainer to lose not only the income from races during the suspension, he is also likely to lose the clients he has collected over the span of his career. This was recognized in the case of *Barchi* v *Sarafan*, 436 F Supp 755 (SD NY, 1977), wherein the Court noted:

> Racehorse trainers may be entrusted with the care of a number of trotters at any given time. The trainer's income is derived in large measure from the proceeds of horse races (as opposed to a salary) and, since, harness 'meetings' are sporadic, trainers cannot recapture the racing opportunities lost by missed meetings. Once a trainer is suspended, even for a brief period, an owner will immediately seek the services of another trainer so that the horse is not barred from racing. This change is often permanent in order to avoid further disruption in the care of the animal . . . Furthermore, defendants do not dispute the fact that a loss of horses in a trainer's stable, occasioned during his suspension can often be an irremedial injury, even though such suspension is erroneous and without justification.

3. The *Barchi* v *Sarafan* case, decided by a three-judge panel of the District Court, was immediately appealed to this Court. *Barry* v *Barchi*, 443 US 55 (1979). This Court recognized the drastic effects that the suspension could have on a trainer, *Barry* v *Barchi, Id*, at 66, 73. The suspension of Mr. Barchi was only for 15 days, whereas the suspension in the present case is for two years. The harm to Joseph Berry is magnified over that which this Court recognized could occur to Mr. Barchi. A two year suspension is akin to a forced retirement, as Joseph Berry would have to start his career over after a two year suspension. He would have no income as a trainer during that period, and would be without horses and clients.

4. It is the claim of Appellant, Joseph Berry, that such an irrebuttable presumption is a violation of the due process clauses of the United States Constitution. It is an arbitrary, unreasonable and capricious rule, penal in nature and effect; resulting in loss of livelihood, denial of the right to practice a chosen profession, and branding an individual as unsuitable for licensing. It takes the property of the trainer, income, business, and an occupation license, without any showing of wrongdoing.

5. Rules, regulations and statutes holding trainers of harness race horses responsible for the condition of horses under their care are not unique to Michigan. These so-called "Insurer's Rules" exist in many jurisdictions in various forms. Some, as in the case of Michigan's, create an irrebuttable presumption of fault or strict liability.

Many states have adopted a rule which, although presuming the responsibility of a trainer, allow the trainer to rebut the presumption of responsibility by showing that he had no involvement or knowledge of the administration of improper substances, and that due care was exercised in protecting the horse from having the substance administered, e.g., *Harbour* v *Colorado State Racing Commission*, 32 Co A 1, 505 P 2d 22 (Colo,

1973); *Commonwealth* v *Webb*, 1 Pa Cmwlth 151, 274 A 2d 261 (Penn, 1971); *Tassistro* v *Louisiana*, 269 F 2d 934 (La, 1972). Some states have a rule requiring a showing of fault before any disciplinary action is taken. e.g. *Maryland* v *McGee*, 212 Md 69, 128 A 2d 419 (Md, 1957). Other reported cases, although not making it clear how the particular rule involved in the state operates, indicate that some evidence of responsibility was found before the trainer was disciplined. *Fioravanti* v *State*, 6 Ma A 299, 375 NE 2d 722 (Mass, 1978); *Smith* v *Cole*, 296 NY 614, 68 NE 2d 888 (NY, 1946).

6. Court decisions concerning Insurer's Rules similar or identical with that of Michigan, divide sharply on the constitutionality of such a rule. Where such a rule has been held constitutional, the prevailing argument was that the rule properly created strict liability on the part of a trainer, which was a valid exercise of the State's police power. Other jurisdictions focus on the effect of the rule and maintain that it creates an irrebuttable presumption and is, therefore, arbitrary, illegal, capricious, and hence unconstitutional. *Mahoney* v *Byers*, 187 Md 81, 48 A 2d 600 (Md, 1946), (Rule subsequently changed to a rebuttable presumption, *see, Maryland* v *McGee, supra*); *Brennan* v *Illinois Racing Board*, A2 Ill 2d 352, 247 NE 2d 881 (Ill, 1969).

7. In *Brennan* v *Illinois Racing Board, supra*, a rule almost identical to Michigan's was drawn into question. The Court held that imposing a penalty on a trainer without any act or omission on his part for what amounts to the committing of a felony by someone else, cannot be upheld as a legitimate exercise of a police power. The Court further stated that a law which prevents one from making a defense of a charge brought against him by substituting an irrebuttable presumption for facts would be "arbitrary, illegal, capricious, and hence unconstitutional". *Brennan* v *Illinois Racing Board, supra*,

at 883. Recognizing that "it is a fundamental principle of Anglo-Saxon justice that responsibility is personal and that penalties may not be inflicted on one person because of another's acts", the *Brennan* court was firm in its conviction that a trainer's license is a valuable property right, and that before a person can be denied this property right, he must first be shown to have been somehow at fault.

The *Brennan* Court further pointed out that the purpose behind these "Insurer's Rules", is not being furthered thereby.

> The thought of the 'absolute insurer' provisions is presumably to induce the trainer to take precautions against a tampering with the horse. But this is not more than he would do anyway, under penalty provisions based on traditional principles of fairness, since the consequences of failing to take precautions would be the same. It would seem that the only applications of the rule that would not be fully covered by one based on fault would be to situations which the trainer could not have prevented anyway. We see little, if any, tendency in penalty without fault provisions to reduce the frequency of the crime. Indeed, it is not unlikely that offenses may be committed which would not otherwise occur. Disgruntled former employees or others wishing to get back at the trainer may well find the rule to be a simple and effective means of causing him to lose his license. He could be penalized regardless of who it was that doped the horse. *Brennan* v *Illinois Racing Board*, *supra*, at 884.

8. In the present case, the Court of Appeals of the State of Michigan upheld Michigan's Insurer's Rule as a valid exercise of the police power, holding that strict responsibility may be imposed because of the interest of the public in the strong regulation of this industry. In so holding, the Court relied on a

line of cases, beginning with *Sandstrom* v *California Horse Racing Board*, 31 Cal 2d 401, 189 P 2d 17 (Cal, 1948), cert. denied, 335 US 814, the progenitor of the cases holding Insurer's Rules constitutional. *Division of Pari-Mutuel Etc.* v *Caple*, 362 SO 2d 1350 (Fla, 1978); *O'Daniel* v *Ohio State Racing Commission*, 37 Ohio 2d 87, 307 NE 2d 529 (Ohio, 1974); *Jamison* v *State Racing Commission*, 84 NM 679, 507 P 2d 426 (NM, 1973).

9. The attempted distinction between strict liability and irrebuttable presumption is based upon specious reasoning, as was recognized by Justice Carter in his dissent in *Sandstrom* v *California Horse Racing Board*, *supra*:

> It is a veiled denial of the obvious — a smoke screen which attempts to obscure the patent objective of the rule . . . Certainly there can be no difference in legal effect between absolute liability and a conclusive presumption of liability. The majority opinion calls it 'strict responsibility'. With this I agree. But this does not render it immune to the due process provisions of the constitution. Certainly, if a statute which purports to create liability by mere fiat is violative of the due process provisions, a rule of an administrative agency which comes within that category would likewise fall in the face of those provisions. *Sandstrom* v *California Horse Racing Board*, *supra*, at 27.

10. This Court has held in a variety of situations that statutes and rules creating an irrebuttable presumption are invalid as a violation of the due process clause of the United States Constitution. *E.g.*, *Stanley* v *Illinois*, 405 US 645 (1972); *Vlandis* v *Kline*, 412 US 441 (1973); *United States Department of Agriculture* v *Murray*, 413 US 508 (1973); *Cleveland Board of Education* v *LaFleur*, 414 US 632 (1974); *Turner* v *Department of*

Employment Security, 423 US 44 (1975); *Tot* v *United States*, 319 US 463 (1943).

11. Prior to the ruling of the Wayne County Circuit Court on Joseph Berry's appeal in this case, another Judge of the Wayne County Circuit Court issued an Opinion, dated May 6, 1981, declaring MIR unconstitutional. *Terry Merriman* v *Office of the Racing Commission*. (App. 48a–53a). In his opinion, Judge Charles Kaufman recognized the lack of difference between characterizing a rule as creating strict liability or a conclusive presumption:

> While some of the cases cited by the respective parties talk about the rule being one of strict liability rather than an irrebuttable presumption, there is in actuality no real difference between the two. On the question of strict liability, this court can think of no criminal statute, or any statute which imposes fines, suspensions, etc. in which strict liability is imposed. Strict liability is well known in the field of torts, where one who puts products into commerce may be strictly liable for any consequential injury caused by its product, but this is not the nature of a criminal or quasi-criminal matter.

12. A thorough analysis of the arguments advanced attempting to justify strict liability rules in horse racing can be found at 74 *Dickinson Law Review*, 303, (1970), Note, *Brennan* v *Illinois Racing Board*: "The Validity Of Statutes Making a Horse Trainer The Absolute Insurer For The Condition Of His Horse". The conclusion reached is that absolute insurer's rules go beyond that which is necessary to protect the racing public, and alternative means are available to achieve the same end. If the rules were to hold the trainer liable only for guilt or negligence, or if it created a rebuttable presumption of fault, the wagering public's interest would be fully protected, particularly where there are statutes which make it a felony to

administer drugs to race horses with the intent to affect their performance in a race.

13. More recently, a law review article was written updating the controversy over insurer's rules. "Brennan Re-Visited: Trainer's Responsibility for Race Horse Drugging", 70 *Kentucky Law Journal*, 1108 (1981–1982), was co-authored by Ray H. Garrison and Jewel N. Kline, a member of the Illinois Racing Board and General Counsel to the Illinois Racing Board, respectively. Although concluding that insurer's rules providing for strict liability are proper, the authors concluded that effective regulation of racing is not dependent solely upon such a rule.

> A conscientious racing commission can maintain the integrity of racing, as many commissions have demonstrated, under a trainer responsibility rule based upon the fault and culpability of the trainer. 70, *Kentucky Law Journal*, at 1129.

14. In *Barry* v *Barchi*, *supra*, this Court had before it New York's Insurer's Rule. Under that rule, a trainer must be shown to have at least been negligent in failing to prevent the drugging before a suspension becomes final. The provision of New York's Insurer's Rule which was in question in this Court was that portion which provided for an interim suspension pending a hearing upon a showing that the horse was drugged and that a trainer has been at least negligent in connection with the drugging. A requirement of at least showing negligence on the part of a trainer was important to this Court's upholding the constitutionality of the interim suspension portion of New York's law. It provided "substantial assurance that the trainer's interest is not being baselessly compromised". *Barry* v *Barchi*, *supra*, 443 US at 65.

The lower court's opinion in *Barry* v *Barchi* also indicates that the rebuttable nature of New York's Insurer's Rule was

important to a finding that the statute was constitutional. Drawing from Justice Powell's concurring opinion in *Arnett* v *Kennedy*, 416 US 134 (1974), the Court noted that:

> The procedures which due process requires under a given set of circumstances depend upon balancing the government interest against the private interest effected. *Barchi* v *Sarafan*, *supra*, at 780.

Recognizing that the State has an important interest in regulating the horse racing industry, and balancing these interests with those of the trainer, the District Court in *Barchi* v *Sarafan*, felt that the Insurer's Rule, providing as it did a means for a trainer to show his non-culpability in a situation, provided a balance between the competing interests so that the rule passed constitutional muster.

> The State's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the 4120.5 presumption, the high standard of accountability is not unconstitutional. *Barchi* v *Sarafan*, *supra*, at 784.

15. The *Barchi* cases show the basic infirmity of Michigan's Insurer's Rule. A valid public purpose is served and the means employed do have *some* relation to that purpose; however, it does not properly balance the rights of the individual with the interests of the state. Less burdensome alternatives to a strict liability standard exist which equally protect the interest of the state and which do not have the same potential for baselessly compromising a person's right to engage in a livelihood. A rule which presumes fault or negligence, and places a burden upon the trainer to rebut that presumption, is a less burdensome alternative that equally protects the interests of the public.

16. In the present case, the Michigan Court of Appeals adopted the reasoning of those jurisdictions which have upheld the validity of strict liability or irrebuttable presumption type insurer's rules statutes based upon the need for "strong police regulation" of the horse racing industry. In his Opinion in *Merriman* v *Michigan Racing Commission* (App. 50a–51a), Judge Charles Kaufman of the Wayne County Circuit Court answers this claim while setting forth cogent reasons why the Insurer's Rule is unconstitutional. In relevant part, Judge Kaufman states as follows:

> It would be a simple matter to state that there is such a strong public interest in the integrity of horse racing that strict rules are required, and, therefore, indicates that the conclusive presumption aspect of the rules of the racing commission are valid and within the exercise of the police power of the state. This does not take into consideration the rights and protections that every individual is guaranteed by the United States and Michigan Constitutions.
>
> * * *
>
> [*Brennan* v *Illinois Racing Board*] recognizes that the principle behind the law in this country is that responsibility is personal and one should not be penalized by acts of another which acts are beyond the accused's control, knowledge or ability to prevent.
>
> * * *
>
> This Court would hold that absolute insurer's regulations violate the due process clause of the Fourteenth Amendment because they are a denial of one's rights and a deprivation of one's property without due process. They go beyond that which is necessary to protect the interests of the public at the expense of one who has not

been proven in any way to have violated any rule, regulation, law or statute. Although the burden of proof imposed may be substantially lighter than '. . . beyond a reasonable doubt. . .' and even be based on a mere preponderance of evidence, or some evidence, the public would be protected and the individual's rights would not be infringed upon. The State, which is the beneficiary of horse racing, has a duty to protect the rights and interests of all its citizens.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully Submitted.

NEIL H. FINK (P 13430)*
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

DAVID S. STEINGOLD (P29752)
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

Attorneys for Joseph Berry Appellant

Dated: May ____, 1984.

* Member of the Bar of the Supreme Court of the United States.

APPENDIX

MICHIGAN COMPILED LAWS ANNOTATED

431.71. Occupational licenses; restrictions; fingerprints; inspections; responsibility of trainer; suspensions; hearing; review; refusal

Sec. 11. (1) Each person participating in or having to do with the racing of horses including but not limited to, all racing officials, veterinarians, horse owners, jockeys, drivers, apprentices, exercise riders, authorized agents, trainers, grooms, valets, owners of stables operating under an assumed name, jockey agents, pony riders, hot walkers, blacksmiths, starting gate employees, and vendors operating within the barn area of a licensed racetrack, shall be licensed by the racing commissioner under rules promulgated by the racing commissioner under this act. The racing commissioner shall not issue an occupational license to a person who was convicted of a felony related to the person's ability and likelihood to serve the public in a fair, honest, and open manner within 6 years immediately preceding application for the occupational license. The racing commissioner shall not issue an occupational license to a person who was convicted of a misdemeanor related to the person's ability and likelihood to serve the public in a fair, honest, and open manner within 2 years immediately preceding application for the occupational license.

(2) As a condition precedent to the issuance of the occupational license, the racing commissioner may demand, in addition to other information the racing commissioner considers necessary and proper, fingerprints of occupational license applicants and, of horse owners or trainers, proof of compliance with Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws. The proof of compliance requirement of this subsection shall not apply to horse owners and trainers not covered under section 115 of Act No. 317 of the Public Acts of 1969, being section 418.115 of the Michigan Compiled Laws.

(3) In addition to the requirements of subsection (2), an applicant for an occupational license shall consent upon application and for the duration of the occupational license, if issued, to personal inspections, inspections of the applicant's personal property, and inspections of premises and property related to his or her participation in a race meeting by persons authorized by the racing commissioner.

(4) A person who is issued an occupational license as a trainer is responsible for and the absolute insurer of the condition of the horses entered to race for the person, corporation, firm, partnership, association, stable, or other legal entity by whom the trainer is employed, except as prescribed by the rules promulgated by the racing commissioner under this act.

(5) Upon the filing of a written complaint, under oath, in the office of the racing commissioner, or upon the written motion of the racing commissioner regarding the actions or omissions of a person issued an occupational license, the racing commissioner may suspend the occupational license of the person for a period of not more than 45 days pending a hearing and final determination by the racing commissioner regarding the acts or omissions complained of in the written complaint. The racing commissioner shall set the date, time, and place for the hearing within 14 days after the occupational license is suspended and notify the holder of an occupational license of the date, time, and place of the hearing not less than 5 days before the date of the hearing. In the conduct of the hearing the racing commissioner is not bound by technical rules of evidence, but all evidence offered before the racing commissioner shall be reduced to writing. That evidence together with the exhibits and the findings of the racing commissioner shall be permanently preserved and shall constitute the record of the racing commissioner in the case. The racing commissioner shall make a written final order setting forth the

reasons for the action taken by the racing commissioner, and a copy of the final order shall be served on the holder of the occupational license. The action of the racing commissioner in revoking or suspending a license is reviewable by the circuit court for the county in which the alleged act or failure to act took place. If the racing commissioner's order is predicated upon a series of acts, the review by the circuit court may be in the county in which any of the alleged acts or failure to act took place.

(6) Upon a refusal by the racing commissioner to issue an occupational license, a writ of mandamus shall not be directed to the racing commissioner until a hearing is held and findings issued on the basis of the hearing. This section shall not impair or change appeals provided for in section 8.[1]

(7) Each occupational licensee shall pay a license fee of not less than $10.00 nor more than $100.00 as determined by the racing commissioner.

P.A. 1980, No. 327, § 11, Imd. Eff. Dec. 18.

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[1] Section 431.68.

Prior Laws:

C.L. 1948, § 431.41.

P.A. 1959, No. 27, § 11.
C.L. 1970, § 431.41.
P.A. 1978, No. 376, § 1.

MICHIGAN HARNESS RACING RULES

R 431.62(b) Corrupt practices.

(4) Personnel and facilities as prescribed by the racing commissioner for the securing of saliva or urine or other samples from horses and for the chemical analysis of such samples shall be required at all meetings. The samples shall be taken from such horses as may be ordered by the commissoner, stewards or harness judges.

(5) If the chemical analysis of saliva, urine or any other sample taken from a horse indicates the presence of a drug or controlled medication which was not reported, this shall be prima facie evidence that the drug or unreported controlled medication has been administered to the horse.

(6) When a positive report is received from the state chemist identifying a drug or controlled medication which was not reported, the stewards shall conduct a thorough investigation and then hold a hearing. The stable shall remain in good standing pending the outcome of the hearing and until a ruling has been made, except that the horse identified with the positive report shall not run during the investigation and hearing.

(7) The trainer shall be responsible for and be the absolute insurer of the condition of the horses entered for his stable regardless of the acts of third parties except as provided in R 431.10(84) in part 1.

(8) If the chemical analysis of a sample indicates the presence of a drug or unreported controlled medication the trainer of the horse and any other person shown to have the care or attendance of the horse or shown to have administered or conspired to have administered the drug

or unreported controlled medication is subject to disciplinary action. A trainer or veterinarian who fails to comply with the controlled medication regulations is subject to disciplinary action. The owner shall be declared unplaced for every purpose except for pari-mutuel wagering. A trophy received by the owner of the horse shall be returned.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN. Held at the Supreme Court Room, in the City of Lansing, on the 21st day of September in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable

G. MENNAN WILLIAMS,
Chief Justice

THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

69478
JOSEPH BERRY,
Plaintiff-Appellant,

v.

MICHIGAN RACING COMMISSIONER,
Defendant-Appellee.

SC: 69478
CoA: 57994
LC: 81-108497-AS

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court to the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set may hand and affixed the seal of said Supreme Court at Lansing this 21st day of September in the year of our Lord one thousand nine hundred and eighty-three.

[SEAL]

/s/ CORBIN R. DAVIS

CLERK

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of February in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable

G. MENNAN WILLIAMS,
Chief Justice

THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

69478
(40)
JOSEPH BERRY,
Plaintiff-Appellant,

v.

MICHIGAN RACING
COMMISSIONER,
Defendant-Appellee.

SC: 69478
CoA: 57994
LC: 81-108497-AS

On order of the Court, the motion by plaintiff-appellant for reconsideration of this Court's order of September 21, 1983, is considered, and the motion is DENIED, because it does not appear to the Court that said order was entered erroneously.

Levin, J., would grant leave to appeal.

STATE OF MICHIGAN — ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court to the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set may hand and affixed the seal of said Supreme Court at Lansing this 28th day of February in the year of our Lord one thousand nine hundred and eighty-four.

[SEAL]

/s/ CORBIN R. DAVIS

Clerk

STATE OF MICHIGAN
COURT OF APPEALS
(Filed May 5, 1982)

JOSEPH BERRY,
Plaintiff-Appellant,

v No. 57994

MICHIGAN RACING COMMISSION,
Defendant-Appellee.

BEFORE: N.J. Kaufman, P.J., and V.J. Brennan and Cynar, JJ. PER CURIAM

Plaintiff, an owner and licensed trainer of harness racehorses, appeals as of right from the trial court's May 22, 1981, order affirming a two-year suspension of plaintiff's trainer's license based on a finding that plaintiff entered to race two horses determined to have apomorphine in their bodies, in violation of the Racing Commissioner's General Rules, Administrative Code 1979 AACS R 431.62(b).[1]

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[1] Administrative Code 1979 AACS R 431.62(b)(8) provides:

> "(8) If the chemical analysis of a sample indicates the presence of a drug or unreported controlled medication, the trainer of the horse and any other person shown to have the care of attendance of the horse or shown to have administered or conspired to have administered the drug or unreported controlled medication is subject to disciplinary action. A trainer or veterinarian who fails to comply with the controlled medication regulations is subject to disciplinary action. The owner of the horse shall not participate in the purse distribution of that race and the horse shall be declared unplaced for every purpose except for pari-mutuel wagering. A trophy received by the owner of the horse shall be returned."

Plaintiff was the trainer of record of two horses, namely, "Quick Ideal" and "Miracle Blend". These horses ran in separate races at Northville Downs on February 7, 1981, and February 14, 1981, respectively. Post-race urinalysis of each horse revealed the presence of apomorphine, a derivative of morphine which in horses acts to stimulate the skeletal muscles and locomotor system. On February 19, 1981, and February 26, 1981, the Northville Downs track stewards issued a 365-day suspension of plaintiff's trainer's license for each incident, to run consecutively. The suspensions were based on the insurer rule, MCL 431.71(4); MSA 18.966(41)(4),[2] which makes the trainer absolutely responsible for the condition of the horses he enters in a race.

On appeal, plaintiff argues that the insurer rule violates the due process clauses of the Michigan and United States constitutions (1) by creating an irrebuttable presumption of fault, and (2) by subjecting to disciplinary action a person not shown to have committed any wrongdoing. The first part of plaintiff's claim may readily be disposed of. Due process forbids the adoption of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact and where the state has a reasonable alternative means of making the crucial determination. *Cleveland Bd. of Education* v *LaFleur*, 414 US 632, 644-645; 94 S Ct 791; 39 L Ed 2d 52 (1974), *Vlandis* v *Kline*, 412 US 441, 452; 93 S Ct 2230; 37 L

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[2] The statute reads:

> "(4) A person who is issued an occupational license as a trainer is responsible for and the absolute insurer of the condition of the horses entered to race for the person, corporation, firm, partnership, association, stable, or other legal entity by whom the trainer is employed, except as prescribed by the rules promulgated by the racing commissioner under this act."

See also, Administrative Code 1979 AACS R 431.62(b)(7).

Ed 2d 63 (1973). Plaintiff contends that whenever a prohibited substance is found in a horse's system the insurer rule creates an irrebuttable presumption that the trainer of the horse administered the substance or negligently cared for the horse. We disagree. The rule, as its name implies, makes the trainer of the horse that is entered into a race the insurer of that horse's condition. *It creates no presumption of trainer fault when the presence of a prohibited substance is found.* The rule simply does not concern itself with assigning fault, but instead requires the trainer, as a contingency of being licensed by the state to bear the responsibility for the horse's condition.[3]

Plaintiff's alternative contention, that due process is violated by the rule since it subjects a person to disciplinary action without a showing of wrongdoing, is also without merit. Due process does not require proof of guilty knowledge before

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[3] The statute may be contrasted with Maryland Racing Commission Rule 146(a) and (d), found to create an irrebuttable presumption of fact in violation of constitutional standards in *Mahoney* v *Byers*, 187 Md 81; 48 A2d 600 (1946):

> "(a) No person shall administer, or knowingly or carelessly permit to be administered to any horse entered for a race, any drug in any way within forty-eight (48) hours before the time of the race."
>
> "(d) If the Commission finds from analysis of the saliva or urine, or blood taken from a horse on the day of a race in which the horse ran, or from other competent evidence, that any drug has been administered to the horse within forty-eight (48) hours before the race, the trainer shall be subject to the penalties prescribed in sub-section (e) hereof, whether or not he administered the drug, or knowingly or carelessly permitted it to be administered. The fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered."

punishment may be imposed. *United States* v *Balint*, 258 US 250; 42 S Ct 301; 66 L Ed 604 (1922), *Shevlin-Carpenter Co* v *Minnesota*, 218 US 57; 30 S Ct 663; 54 L Ed 930 (1910). In areas subject to strong police regulation, the state may impose the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger. *United States* v *Dotterweich*, 320 US 277, 280–281; 64 S Ct 134; 88 L Ed 48 (1943). In *Dotterweich*, the Supreme Court held that criminal liability for the introduction or delivery into interstate commerce of adulterated or misbranded drugs could attach to a defendant solely because of his position of authority or responsibility as president and general manager of a corporation. More recently, *Dotterweich* was reaffirmed in *United States* v *Park*, 421 US 658; 95 S Ct 1903; 44 L Ed 2d 489 (1975). The Court wrote:

> "Thus Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission — and this is by no means necessarily confined to a single corporate agent or employee — the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them. Cf. Wasserstrom, Strict Liability in the Criminal Law, 12 Stan L Rev 731, 741–745 (1960)." Id., 421 US at 672 (footnote omitted), *see also*, *People* v *DeClerk*, 400 Mich 10, 19–23; 252 NW2d 782 (1977).

A majority of those jurisdictions considering the issue have concluded that horse racing is an activity requiring strong police regulation to protect the public interest. *E.g.*, *Division of Pari-Mutuel Wagering* v *Caple*, 362 So2d 1350, 1355 (Fla., 1978), *Dare* v *State*, 159 N.J. Super. 533; 388 A2d 984 (1978), *O'Daniel* v *Ohio State Racing Commission*, 37 Ohio St 2d 87; 307 NE2d 529, 533 (1974), *Sandstrom* v *California Horse Racing Board*, 31 Cal 2d 401; 189 P2d 17, 21, *cert den* 355 US 814; 69 S Ct 31; 93 L Ed 369 (1948), *but see Brennan* v *Illinois Racing Board*, 42 Ill 2d 352; 247 NE2d 881 (1969). As stated in *Dare* v *State*, *supra*:

> "The danger of clandestine and dishonest activity inherent in the business of horse racing has been well recognized. *Garafine* v. *Monmouth Park Jockey Club*, 29 N.J. 47, 55, 148 A.2d 1 (1959). The business itself and the legalized gambling which accompanies its activities are strongly affected by a public interest. *State* v. *Garden State Racing Ass'n*, 136 N.J.L. 173, 175, 54 A.2d 916 (E. & A. 1947). Corruption in horse racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. *State* v. *Sipp*, 148 N.J. Super. 451, 457, 246 A.2d 146 (App.Div. 1968)." *Dare* v. *State*, *supra*, 388 A2d at 985.

We believe that a strong public interest justifying close regulation of horse racing is self-evident. Horse racing is accompanied by legalized gambling, making the activity especially susceptible to fraud and corruption. Strong regulation protects not only the wagering public, but advances the state's economic interests in the racing business by preserving public confidence in the activity.

The trainer of a horse stands in a position of "responsibility and power" to guarantee the condition of the horse when entered in a race. See *People* v *DeClerk*, *supra*. Moreover, the

activity of a trainer is one that is voluntarily assumed at the state's permission. Due process would not forbid a complete ban on horse racing as a legalized form of gambling. The imposition of strict liability is reasonable because the trainer is the person best able to prevent illegal drugging. The insurer rule provides maximum protection against illegal drugging; arguably it is the only practical means of reducing such corrupt practices. *Morris* v *West Virginia Racing Commission*, 133 W. Va. 179; 55 SE2d 263 (1949). If, as plaintiff proposes, we were to conclude that due process necessitates a finding of guilty knowledge of intent prior to the imposition of sanctions, enforcement of the prohibition on horse drugging would be virtually impossible, and the interests of the public and state would go unprotected. The insurer rule is a reasonable alternative to either leaving those interests unprotected or forbidding legalized racing. Stated alternatively, the insurer rule constitutes a proper exercise of police power inasmuch as (1) it seeks to advance a valid public purpose, and (2) it provides a remedy that is reasonably related to that public purpose. *Van Slooten* v *Larsen*, 86 Mich App 437, 445; 272 NW2d 675 (1978), *aff'd*, 410 Mich 21; 299 NW2d 704 (1980).

Plaintiff also argues on appeal that his due process right to notice of the charges against him was violated when the racing commission hearing officer stated in his conclusions that the use of apomorphine violated an additional statute not mentioned in the initial notice to plaintiff.

The notice of hearing sent to plaintiff on March 5, 1981, provided, in part:

> "The aforementioned allegations will be considered at the hearing under the Racing Commissioner's Rules for Harness Racing and General Provisions, including R 431.62(b) Corrupt Practices, Subsections (4), (5), (6), (7), and (8), of the Racing Law of 1980, and the Administrative Procedures Act of 1969, as amended."

The Racing Commissioner's General Rule, Administrative Code 1979 AACS R 431.62(b)(2)(a) defines the term drug in the following manner:

> "(2) As used in this rule:
>
> "(a) 'Drug' means any medication or metabolic derivative thereof, which is a narcotic, or which could serve as a local anesthetic or tranquilizer, or which could stimulate or depress the circulatory, respiratory or central nervous system of a horse. A horse which has been entered to race shall not carry a drug in its body."

The purpose of the rule is to accomplish the prohibition or control of drugs and medications which would affect the racing condition or performance of a horse. Administrative Code 1979 AACS R 431.62(b)(1). Here, the racing commission hearing officer concluded that apomorphine "is a stimulant, which stimulates the nervous system of a horse and could affect the racing condition of a horse". Thus, the hearing officer

determined that the presence of the drug violated the Racing Commission General Rules as cited in the notice of hearing sent to plaintiff. The hearing officer also made reference to MCL 431.83; MSA 18.966(53),[4] concluding that it also prohibited the use of apomorphine. The basis of plaintiff's appellate argument is that he was actually found culpable for violating the statutory provision, which he had no notice would be considered.[5]

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[4] MCL 431.83; MSA 18.966(53), a direct statutory prohibition of administration of drugs to race horses, contains a more broad definition of the term "drug":

> "(3) As used in this section, 'drug' means any of the following:
>
> "(a) A substance recognized or for which the standards or specifications are prescribed in the United States pharmacopoeia-national formulary, homeopathic pharmacopoeia of the United States, or any supplements.
>
> "(b) A substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals.
>
> "(c) A substance, other than food, intended to affect the structure of any function of the body of humans or other animals.
>
> "(d) A substance intended for use as a component of a substance specified in subdivision (a), (b), or (c)."

[5] The Administrative Procedures Act, MCL 24.271; MSA 3.560(171) provides for notice to a party appearing before an administrative body:

> "(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:
>
> "(a) A statement of the date, hour, place and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.
>
> "(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(footnotes continued on next page)

After reviewing carefully the record of the proceedings before the racing commission hearing officer, we conclude that plaintiff's claim is without merit. We believe the hearing officer's reference to MCL 431.83; MSA 18.966(53) was superfluous conclusion made after he had determined that the racing commission rule prohibited the use of apomorphine. The reference was not essential to the ultimate conclusion made that plaintiff was absolutely responsible for a violation of the commission rule. Moreover, we disagree with plaintiff's contention that the evidence produced at the hearing failed to prove that apomorphine is a "drug" as defined by the rule. Dr. John R. Keating, D.V.M., testified that apomorphine was a morphine derivative that affected horses, although unpredictably so, as a stimulant. He indicated that it was a locomotor stimulant, stimulating the skeletal muscles and allowing a horse to run with more power. Dr. Kenneth Gallagher, D.V.M., testified in a consistent manner, indicating that the drug was not FDA approved for horses, and that it acted to stimulate the locomotor systems, the muscles and nerves. Further, the text of an article[6] entered as an exhibit at

(footnotes continued from previous page)

"(c) A reference to the particular sections of the statutes and rules involved.

"(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues."

[6] T. Tobin, J. Combie & T. Shults, *Pharmacology Review: Actions of Central Stimulant Drugs in the Horse II*, 3 Journal of Equine Medicine & Surgery 102 (March, 1979).

the hearing stated that, particularly in horses, apomorphine is a powerful locomotor stimulant. Quite clearly, apomorphine fits the definition of those drugs sought to be prohibited by the racing commission rule. Plaintiff was provided with direct and sufficient notice of the commission's reliance on the rule.

Plaintiff's final appellate claim is that he was denied the right to legal representation when he initially appeared before the track stewards, in violation of statute and due process standards. The Racing Commissioner's General Rules, Administrative Code 1979 AACS R 431.63(c), provide that a licensee is entitled to representation at *any* hearing. When plaintiff appeared before the track stewards with an attorney he was told that counsel could remain present but could not participate.[7] While we agree that the stewards clearly erred in suppressing counsel's participation, we do not believe that the error necessitates reversal and reinstitution of proceedings against plaintiff. Plaintiff was subsequently afforded a full *de novo* hearing before a racing commission hearing officer, at which counsel participated, and where he was permitted to introduce evidence on plaintiff's behalf. The requisites of due process were thus complied with.

Affirmed.

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[7] The stewards apparently believed the limitation could be made in order to prevent a "shouting match" and, thereby, retain control over the proceedings.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

JOSEPH BERRY,
Plaintiff,

vs. No. 81 108497 AS

MICHIGAN RACING COMMISSIONER,
Defendant.

OPINION

At a session of said Court held at 1901 City County Building, Detroit, Michigan, on the 14th day of May,1981.

PRESENT: Honorable Thomas J. Foley

This matter is before the court by way of appeal from an order of the State of Michigan Racing Commission dated April 3, 1981. The Commission ruling affirmed a decision of the Stewards of Northville Downs rendered February 19 and February 26, 1981, respectively. Plaintiff was present and represented by his counsel but chose not to offer any evidence in defense.

All matters presented by way of briefs, reply briefs, arguments in open court and record of the proceedings before the Commission have been reviewed by this Court.

The facts are not in dispute. Joseph Berry, Plaintiff, was the trainer of record of two horses, namely, "Quick Ideal" and "Miracle Blend." These horses ran in separate races at Northville Downs February 7 and February 14, 1981, respectively. Both horses were found to have the substance "Apomorphine" in urinalysis tests taken and examined by the Racing Commission.

The Michigan Racing Commission suspended the license of Joseph Berry on February 20, 1981 for a period of two years on the basis of a violation of the Racing Commission Rules for Harness Racing and General Provisions including R.431.62(b), Corrupt Practices, Sub-sections (4), (5), (6), (7), and (8).

The General Provisions of R.431.62(b) provide in part:

"(1) The intent of this rule is to protect the integrity of horse racing, to safeguard the health of the horse and to protect the interest of the general public and the racing participants through the prohibition or control of drugs and medications which could affect the racing condition or performance of a horse.

(2)(a) 'Drug' means any medication or metabolic derivative thereof, which is a narcotic, or which could serve as a local anesthetic or tranquilizer, or which could stimulate or depress the circulatory, respiratory or central nervous system of a horse. A horse which has been entered to race shall not carry a drug in its body.

* * *

(4) Personnel and facilities as prescribed by the racing commissioner for securing of saliva or urine or other samples from horses and for the chemical analysis of such samples shall be required at all meetings. The samples shall be taken from such horses as may be ordered by the commissioner, stewards or harness judges.

(5) If the chemical analysis of saliva, urine or any other sample taken from a horse indicates the presence of a drug or controlled medication which was not reported this shall be prima facie evidence that the drug or unreported controlled medication has been administered to the horse.

(6) When a positive report is received from the state chemist identifying a drug or controlled medication which was not reported, the stewards shall conduct a thorough investigation and then hold a hearing. * * *

(7) The trainer shall be responsible for and be absolute insurer of the condition of the horses entered for his stable regardless of the acts of third parties except as provided in rule 84 in part 1.

(8) If the chemical analysis of a sample indicates the presence of a drug or unreported controlled medication, the trainer of the horse and any other person shown to have the care or attendance of the horse or shown to have administered or conspired to have administered the drug or unreported controlled medication is subject to disciplinary action. * * *"

The record below amply supports the commission's conclusion that "Apomorphine" found in the blood of both "Quick Ideal" and "Miracle Blend" was within the meaning of subsection (5), *supra,* "a drug. . . which was not reported." (See transcript of proceedings dated March 27, 1981; testimony of Dr. John Keating T 192, 193, 194, 196, 197, 212, 213. Dr. Ken Gallagher T 231, 232.)

Dr. Gallagher at page 232 in his testimony summarizes the effect of "Apomorphine" on horses as follows:

"Well, the primary reason it is used on a horse is to stimulate the locomotor system, the muscles and the nerves."

It is interesting to note in this regard that the Massachusetts State Racing Commission found "Apomorphine" to be a prohibited drug which affects the speed of a horse. *Fioravanti* v *State Racing Commission,* 375 NE 2d 722 (1978).

The primary question presented in this appeal is whether paragraph (7) of R.431.62(b), *supra,* commonly referred to in the racing industry as the "Insurer's Rule", is constitutionally sound.

This is a matter of first impression in the State of Michigan. The vast majority of the courts throughout the United States have held the "Insurer's Rule" is constitutionally sound.

In testing the constitutionality of a regulation exercising the police power of the State, all rational presumptions are made in favor of validity of the regulation. The courts must be slow to strike down administrative actions stemming from legislative dictate where there exists reasonable and rational grounds to support the questioned action.

The intent of R.431.62(b) is to protect the integrity of horse racing, to safeguard the health of the horse and to protect the interest of the general public and the racing participants. Horse racing when coupled with pari-mutuel betting is an industry which, absent strict control, lends itself to temptations of fraud and deceit. The public, both on and off track, wager millions of dollars daily. The State of Michigan has a great financial stake in the pari-mutuel aspect of the sport. There is great appeal and danger to the participants in the racing function itself.

That strict control of horse racing and pari-mutuel betting is in keeping with good sound public policy cannot be seriously disputed. Strict control is mandated in order to maintain the integrity of this unique sport.

Strict control of the racing industry in the State of Michigan includes in its rules a provision no longer unique, namely, the so-called "Insurer's Rule."

A majority of jursidictions in the United States have considered the constitutionality of the "Insurer's Rule" which

makes trainers absolute insurers of the physical integrity of horses entered in races. In each of the instances, trainers, as here, have claimed violation of their right to due process when held responsible under the "Insurer's Rule."

The reasoning of courts throughout the land is most succinctly stated by the Ohio Supreme Court in *O'Daniel* v *Ohio State Racing Commission,* 37 Ohio St 2d 87; 307 NE 2d 529.

> "The principal question presented in this case is whether RC-13-02, the 'insurer rule' of the Rules of Racing of the Ohio State Racing Commission, which imposes strict accountability upon a trainer for the condition of the horse he enters in a race, is constitutional, valid and within the scope of authority granted the Ohio State Racing Commission by the General Assembly.
>
> The Ohio insurer rule essentially imposes liability, without fault, upon trainer of record who enters into a race a horse which has been administered any chemical or drug.
>
> Many states have promulgated similar insurer rules; six of these jurisdictions have judicially scrutinized the rule's validity. One line of cases holds the insurer rule constitutional and valid as an imposition of liability without fault, in a business requiring strong police measures for the public safety and welfare. Jamison v. State Racing Comm. (1973), 84 N.M. 679, 507 P.2d 426; Sanderson v. New Mexico State Racing Comm. (1969), 80 N.M. 200, 453 P. 2d. 370; Sandstrom v. California Horse Racing Board (1948), 31 Cal. 2d 401, 189 P.2d 17, certiorari denied, 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369; State ex rel. Morris v. West Virginia Racing Comm. (1949), 133 W. Va. 179, 55 S.E. 2d 263.

On the other hand, a divergent line of cases finds the insurer rule an unconstitutional denial of due process, and requires either an actual showing of trainer negligence, or proof that the trainer administered, or permitted administration of, a substance known to affect the horse's performance, before liability may be imposed. State ex rel. Paoli v. Baldwin (1947), 159 Fla. 165, 31 So. 2d 627; Mahoney v. Byers (1946), 187 Md. 81, 48 A. 2d 600, and Brennan V. Illinois Racing Board (1969), 42 Ill. 2d 352, 247 N.E. 2d 881.

However, as applied to the facts of this case, those three divergent cases are not persuasive. The *Baldwin* and *Mahoney* cases were aptly distinguished in Sandstrom v. California Horse Racing Board, *supra,* 31 Cal. 2d 401, at 411, 189 P. 2d 17, at 23, as follows:

> '* * * The rule considered in Mahoney v. Byers, *supra,* * * * substituted an irrebuttable presumption for an essential fact. Thus evidence was made conclusive which was not so of its own nature and inherent force. In the case at bar liability is not predicated on administration of the drug nor on the failure to exercise due care, and the presence or absence thereof would neither add nor detract. State v. Baldwin, *supra,* * * * would at first appear persuasive since Rule 117, there considered, somewhat parallels Rule 313 now under attack. But that case did not consider the power of a state to impose strict liability, the existence of which is the fundamental basis of our determination. Also, it would appear that the decision in the *Baldwin* case, was influenced decisively by analogy to Mahoney v. Byers, *supra,*

> * * * where the mechanics rested in the employment of a presumption as conclusive evidence.'

The majority in the third case, Brennan v. Illinois Racing Board, *supra.* relied solely upon the soundly distinguished cases of Mahoney v. Byers and State ex rel. Paoli v. Baldwin, and made no attempt to reconcile those cases with the contrary line of authority from other jurisdictions.

A strong dissent in *Brennan,* at page 361 or 42 Ill. 2d, 247 N.E. 2d 881, pointedly explained that the court in State ex rel. Paoli v. Baldwin initially *upheld* the insurer rule, but upon rehearing, in light of the recently decided *Mahoney* case, the court applied the reasoning of the *Mahoney* case to invalidate the Florida insurer rule, and that ten years later the Maryland court in Maryland Racing Commission v. McGee (1957), 212 Md. 69, 128 A. 2d 419, 'distinguished the *Mahoney* case and sustained the validity of a rule which imposed an absolute liability upon the trainer to so guard his horses that no drug could be administered.'

Thus, the weight of reasoned authority sustains the validity and constitutionality of the insurer rule."

The Court also stated that:

"Since we have determined that horse racing is one of those fields subject to extraordinarily broad regulatory powers, we hold that Rule RC 13-02, of the Rules of Racing promulgated by the Ohio State Racing Commission, which imposes strict accountability upon a trainer for the condition of the horse he enters in a race, is not unconstitutional,

void or beyond the scope of authority granted the commission by the general assembly.''[1]

It should be noted that the State of Florida has specifically overruled the *Baldwin* decision, *supra*, and adopted the majority rule supporting the ''Insurer's Rule'' of absolute liability as a valid exercise of police power. *Division of Pari-Mutuel Wagering, Department of Business Regulation, State of Florida* v *W. F. Caple*, 362 SO 2d 1350 (1978).

It is claimed that plantiff has been denied due process of law in that such concept would at least require guilty knowledge or wrongdoing before punishment.

As already noted the ''Insurer's Rule'' creating strict liability is not novel in our system of jurisprudence where there is activity requiring strong police action to protect the public interest. Horse racing coupled, as it is, with pari-mutuel betting, is such an activity.

The Florida Supreme Court citing the Supreme Court of the United States in *Division of Pari-Mutuel Wagering, Department of Business Regulations, State of Florida* v. *W. F. Caple, supra*, stated in pertinent part:

''As regards the proposition that due process invariably requires proof of guilty knowledge before punishment

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[1] Upholding an absolute insurer's provision: *Sandstrom* v *California Horse Racing Bd.*, 81 Cal 2d 401, 407, 189 P 2d 17, cert. denied, 335 US 814, 69 S Ct 31, 93 L Ed 369 (1948). *Morris* v *West Va. Racing Comm.*, 133 W Va 179, 201–202, 55 SE 2d 263 (1949). *O'Daniel* v *State Racing Commn.*, 84 N.M. 679, 680–681, 507 P2d 426 (1973). *Contra, Brennan* v *Illinois Racing Bd.*, 42 Ill 2d 352, 354–358, 247 NE 2d 881 (1969). See *Mahoney* v *Byers*, 187 Md 81, 87, 48 A2d 600 (1946). See generally Annot., 52 ALR 3d 206 (1973).

> can be inflicted, that notion was long ago put to rest by the United States Supreme Court. See e.g., *United States* v. *Balint*, U.S. 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604 (1922); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 30 S. Ct. 663, 54 L. Ed. 930 (1910). *It is now well established that in areas of activity requiring strong police regulation to protect public interest, strict liability may be imposed upon persons 'otherwise innocent but standing in responsible relation to a public danger.' United States* v. *Dotterweich,* 320 U.S. 277, 281, 64 S. Ct. 134, 88 L. Ed. 48 (1943). *Horse racing is such an area of activity. Western Turf Association* v. *Greenberg,* 204 U.S. 359, 27 S. Ct. 384, 51 L. Ed 520 (1907)." (Emphasis supplied.)

A two-year suspension in view of the serious and flagrant nature of the two violations of record constitutes a reasonable disciplinary action under all the attending circumstances and is within the discretionary powers of the Michigan Racing Commission.

This court therefore concludes that the record below amply supports a finding of violation of the Racing Commission Rules for Harness Racing; that the drug "Apomorphine" was within the prohibition of such rules; that the so-called "Insurer's Rule" is constitutionally sound and conforms with similar holdings in a majority of jurisdictions in the United States; that public policy, interest of the State of Michigan, the citizens of such state and the racing participants require a strict accountability because of the unique nature of the racing-pari-mutual sport, and finally, the sanction assessed in the instant matter is within the legitimate limits of the Racing commissioner's discretionary powers.

Thus, this Court denies Plaintiff's request for injunctive relief and sustains the findings and sanction imposed as a result of such findings by the Michigan Racing Commission. Costs and attorney fees are awarded to the Respondent.

An order conforming to this opinion shall be presented within ten (10) days.

/s/ THOMAS J. FOLEY
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE
(Filed May 22, 1981)

JOSEPH BERRY,
Plaintiff,

vs. No. 81 108497 AS

MICHIGAN RACING COMMISSIONER,
Defendant.

FINAL ORDER

At a session of said Court held at 1901 City County Building, Detroit, Michigan, on the ____ day of _____, 1981.

PRESENT: Honorable Thomas J. Foley

The claim of appeal of Joseph Berry, Plaintiff herein, having been regularly filed herein, the Court having reviewed the entire file herein, and the court being fully advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's appeal is hereby denied with prejudice, with costs and attorney fees to respondent and that the opinion of this court dated May 14, 1981, is hereby incorporated by reference herein.

/s/ THOMAS J. FOLEY

Circuit Judge Thomas J. Foley

Approved as to form

/s/ TED KLIMASZEWSKI

Ted Klimaszewski
by David Steingold

/s/ GERALD E. THURSWELL

Gerald E. Thurswell

STATE OF MICHIGAN
THE OFFICE OF RACING COMMISSIONER
(Filed April 2, 1981)

In the matter of:

The Appeals of Joseph Berry Pursuant to the Stewards' Rulings on February 19, 1981 and February 26, 1981 at Northville Downs

ORDER

The above entitled appeal hearing having been heard before hearing officer David G. Johnson, and his written opinion having been submitted to the Commissioner, and that opinion being attached hereto and by reference incorporated herein, and the Commissioner having reviewed the record, including the briefs submitted by both counsel,

IT IS HEREBY ORDERED that the February 19, 1981 decision of the stewards, revoking the appellant's occupational license, be, and the same is affirmed.

IT IS FURTHER ORDERED that the February 26 decision of the stewards ruling appellant off the track be, and the same is affirmed, with the following modification: the words (except for spectator area) are deleted.

IT IS FURTHER ORDERED that the revocation of the occupational license and the ruling off are to run consecutively. The purpose of this Order is to have appellant serve 365 days for each of the positive Apomorphine tests.

/s/ FREDERICK S. VAN TIEM
Frederick S. Van Tiem
Commissioner

/s/ ESTHER L. MCSWEEN
Executive Secretary

Dated and Mailed:

STATE OF MICHIGAN
THE OFFICE OF RACING COMMISSIONER

In the matter of:
THE APPEALS OF JOSEPH BERRY
PURSUANT TO THE STEWARDS'
RULINGS ON FEBRUARY 19, 1981
AND FEBRUARY 26, 1981
AT NORTHVILLE DOWNS

OPINION

Statement

A hearing was held, pursuant to two appeals by Joseph M. Berry, on March 27, 1981 beginning at 10:00 a.m. The hearings were originally scheduled to be held at separate times on that date, however, by agreement of counsel the matters were consolidated into one hearing. Mr. Berry appealed from a ruling of the Stewards dated February 19, 1981 which disqualified the horse, Quick Ideal, the winner of the fifth race on February 7, 1981 and revoked the occupational license of Mr. Berry for a period of 365 days, pursuant to their finding that the urine sample for that horse tested positive for the drug, Apomorphine. Mr. Berry also appealed a ruling of the Stewards dated February 26, 1981 which ruled Mr. Berry off the track for a period of 365 days commencing February 20, 1982, pursuant to their finding in that the urine sample for said horse tested positive for the drug, Apomorphine. Mr. Berry appealed both suspensions stating that the suspension period was excessive and unwarranted and claiming the trainer's responsibility rule is unconstitutional. Notice of Hearings were sent to Mr. Berry and all parties in interest on March 5, 1981 scheduling the two separate hearings.

The Stewards' ruling and the charges set forth in the Notice of Hearing were pursuant to the Racing Law of 1980, MCLA 431.71 and the State of Michigan, Office of the Racing Commissioner, Rules and Regulations Governing Harness Racing, Rule 431.62(b) which state as follows:

> "R 431.62(b) Corrupt practices.
> (4) Personnel and facilities as prescribed by the racing commissioner for the securing of saliva or urine or other samples from horses and for the chemical analysis of such samples shall be required at all meetings. The samples

shall be taken from such horses as may be ordered by the commissioner, stewards or harness judges.

(5) If the chemical analysis of saliva, urine or any other sample taken from a horse indicates the presence of a drug or controlled medication which was not reported, this shall be prima facie evidence that the drug or unreported controlled medication has been administered to the horse.

(6) When a positive report is received from the state chemist identifying a drug or controlled medication which was not reported, the stewards shall conduct a thorough investigation and then hold a hearing. The stable shall remain in good standing pending the outcome of the hearing and until a ruling has been made, except that the horse identified with the positive report shall not run during the investigation and hearing.

(7) The trainer shall be responsible for and be the absolute insurer of the condition of the horses entered for his stable regardless of the acts of third parties except as provided in R 431.10(84) in part 1.

(8) If the chemical analysis of a sample indicates the presence of a drug or unreported controlled medication the trainer of the horse and any other person shown to have the care or attendance of the horse or shown to have administered or conspired to have administered the drug or unreported controlled medication is subject to disciplinary action. A trainer or veterinarian who fails to comply with the controlled medication regulations is subject to disciplinary action. The owner shall be declared unplaced for every purpose except for pari-mutuel wagering. A trophy received by the owner of the horse shall be returned.

MCLA 431.71(4) A person who is issued an occupational license as a trainer is responsible for and the absolute insurer of the condition of the horses entered to race for the person, corporation, firm, partnership, association, stable, or other legal entity by whom the trainer is employed, except as prescribed by the rules promulgated by the racing commissioner under this act.

At the hearing, the Attorney General representing the Office of the Racing Commissioner presented ten witnesses as follows:

1. Edward Grzybowski, urine collector
2. Beverly Whitbeck, urine collector
3. Arlo Pickens, State Racing Chemist
4. Dr. Clark Woolpert, D.V.M.
5. Dana Taylor, State Stewart
6. Frank Utter, State Stewart
7. Fred Greenly, Jr., State Stewart
8. Richard Rudnicki, Presiding Stewart
9. John R. Keating, D.V.M.
10. Ken Gallagher, D.V.M.

The Appellant did not present any witnesses. In addition, twenty (20) exhibits were admitted into the record at the time of hearing. The exhibits are as follows:

1. Notice of Hearing dated March 5, 1981
2. Notice of Suspension dated February 19, 1981
3. The Appeal from the suspension of February 19, 1981
4. The urine sample tag for the horse, Quick Ideal

5. The Report of Analysis from the Michigan Lab dated February 17, 1981

6. Letter from the Michigan Lab dated March 17, 1981

7. Program sheet for the fifth race of February 7, 1981

8. Previous night's results for February 7, 1981

9. Stricken from the hearing record

10. Notice of Hearing dated March 5, 1981

11. Appeal from ruling of February 26, 1981

12. Notice of Suspension dated Febraury 26, 1981

13. Urine sample tag for the horse, Miracle Blend

14. Program sheet for the fourth race on February 14, 1981

15. Previous night's results for February 14, 1981

16. Report of Anaylsis from Michigan Department of Agriculture Laboratory

17. Letter from Michigan Department of Agriculture Laboratory dated March 17, 1981

18. 1981 Log book of Dr. Clark Woolpert, D.V.M.

19. 1980 Log book of Dr. Clark Woolpert, D.V.M.

20. Narcotics log of Dr. Clark Woolpert, D.V.M.

Three (3) additional exhibits were offered by the Assistant Attorney General. Proposed exhibit Number 21 is an article entitled "Pharmacology Review: Actions of Central Stimulant Drugs in the Horse II." Proposed exhibit No. 22 is an affidavit from George A. Maylin, D.V.M. Proposed exhibit No. 23 is a series of letters and affidavits from Tom Tobin, D.V.M., Ph.D., dealing with the drug, Apomorphine. Rulings on the admission of the three proposed exhibits were taken under advisement at the time of hearing.

The Hearing Officer for the Office of the Racing Commissioner, pursuant to the Racing Law of 1980, is not bound by the technical rules of evidence. In MCLA 431.71(5) it states:

> "In the conduct of the hearing the racing commissioner is not bound by technical rules of evidence. . ."

The Administrative Procedures Act, MCLA 24.275 states:

> "In a contested case, the rules of evidence as applied in a non-jury civil case in civil court shall be filed as far as practical, but an agency may admit and give probative effect to evidence of a type commonly relied upon but reasonably prudent men in the conduct of their affairs."

It is clear that under the technical rules of evidence the three exhibits, 21, 22 and 23, offered are inadmissible. However, the Hearing Officer reviewed the exhibits to determine their probative value, their relevance, and possible prejudical effect on the Appellant. Pursuant to that analysis and the evidentiary guidelines contained in the Racing Law of 1980 and the Administrative Procedures Act, exhibit No. 21 is hereby admitted into the record. Exhibit No. 21 is an article involving the drug, Apomorphine, and it therefore has relevance and probative value in this matter. In addition, the record contains the testimony of two veterinarians who support the conclusions and factual information contained in this article. The Appellant did not rebut the testimony of the veterinarians or offer any evidence to the contrary, and therefore the article is not admitted to contradict expert testimony, but rather to support the record. Exhibits 22 and 23, affidavits from the designated veterinarians, are not admitted into the record. They lack clear cut probative value. Exhibits 22 and 23 are cumulative, the opinions of two expert witnesses without their

foundational facts and research as is found in the admitted article, exhibit No. 21, and it is therefore found that their probative effect is far outweighed by the prejudicial effect admission of the article may have. Therefore, the admission of exhibits 22 and 23 are denied.

The attorneys representing both parties made opening statements setting forth their position. Ted Klimaszewski, Assistant Attorney General, stated that two positive tests were made for Apomorphine, a medication prohibited by the Racing Law of 1980 and Rules and Regulations Governing Harness Racing. He argued that each finding of the illegal drug was a violation of the Rules and Regulations and subject to disciplinary action. He stated that the one year suspension for each positive test was reasonable and fair. Gerald Thurswell, representing the Appellant, Joseph M. Berry, stated that the absolute insurer's rule pertaining to trainers was unconstitutional. He also stated that Apomorphine is not a prohibited drug or medication, was not found in the urine of either of the horses alleged and if present in the urine had no effect on the horse which would be prohibited by the Law or Rules and Regulations.

Findings of Fact

The testimony of the urine collectors, Edwary Grzybowski and Beverly Whitbeck, together with the stipulation of Mr. Thurswell that the samples taken from the horses, Quick Ideal and Miracle Blend, were the samples tested by Arlo Pickens, the State Chemist, established that the tests were conducted on the urine samples of the horses involved. Arlo Pickens, the State Racing Chemist for 27 years, was voir dired by Appellant's counsel and is found qualified to testify as an

expert in his capacity as a chemist. Arlo Pickens testified that the urine sample of the horse, Quick Ideal, was tested and resulted in ten separate positive tests for Apomorphine. Mr. Pickens testified that the urine sample of the horse, Miracle Blend, showed seven separate positive tests for the drug, Apomorphine. It is hereby found that the horse, Quick Ideal, raced with the drug, Apomorphine, in its body on February 17, 1981. It is hereby found that the horse, Miracle Blend, raced with the drug, Apomorphine, in its body on February 14, 1981.

The testimony of Dr. John R. Keating, D.V.M., Dr. Ken Gallagher, D.V.M., and exhibit No. 22 define and establish the effects of Apomorphine in a horse. It is hereby found that Apomorphine is a drug obtained from Morphine and is indicated as a medication for humans. It is found that Apomorphine acts to induce vomiting in humans, but has an entirely different effect when administered to a horse. It is found that when administered to a horse, Apomorphine is a rapid acting locomotor stimulant effecting neurons in the nervous system. It is further found that the drug, Apomorphine, when administered to a horse, has an unpredictable nature and either may stimulate or may not stimulate an individual horse. Therefore, it is found that Apomorphine, when administered to a horse, is a stimulant which could effect the racing condition or performance of a horse.

Dr. Clark Woolpert testified that he has been a veterinarian for 15 years. He testified that on occasion he has treated horses trained by Joseph Berry. He testified that he keeps his records in ledger books. Thereafter Dr. Woolpert did not answer any of the additional questions posed to him, instead, claimed the protection of the Fifth Amendment of the United States Constitution and refused to answer.

State Steward Dana Taylor testified extensively at the hearing concerning the two rulings and suspensions given, and the reasons for those suspensions. He stated that the 365 days was, in his opinion, "just." He testified that in his experience in Michigan, all positive tests for stimulants have been given one year and implied that policy would continue. He noted that the decisions concerning the penalties imposed were within the discretion of the Stewards, and that no input or standards were given to them by the Racing Commissioner for the State of Michigan, Frederick S. Van Tiem.

Mr. Taylor testified that the Stewards imposing the suspension relied upon the absolute insurer rule. This rule is found in the Racing Law of 1980 and Rule 431.62(b). The rule makes the trainer the absolute insurer of the condition of his horse. Mr. Taylor testified that the Stewards had no direct evidence that the drug, Apomorphine, was administered by Mr. Berry or specifically at his direction. Mr. Taylor did indicate that at the previous hearing, Mr. Berry testified that Dr. Clark Woolpert was told to give each of the two horses involved something to "break them loose." He indicated Mr. Berry stated he did not know what was given and that if he had known what was being administered he would not have allowed the administration. However, the Stewards did not rely on this testimony to suspend Mr. Berry, instead they relied solely on the insurer's rule.

Mr. Taylor testified that the penalty was imposed for a number of reasons. He stated that the public and the participants must be protected from the type of fraud evident when stimulants are administered to race horses. He indicated that the use of a stimulant was a serious offense and must be dealt with harshly. The testimony of the additional Stewards, Frank Utter, Richard Rudnicki and Fred Greenly, Jr., supported the statements made by Mr. Taylor.

The records of Dr. Clark Woolpert were admitted into the hearing record after their identification by State Steward Dana Taylor. Mr. Taylor testified that he received these ledger books from Dr. Woolpert at an earlier hearing. A review of the 1981 ledger book of Dr. Woolpert and his narcotics ledger indicate that on February 3, 1981, he administered Apomorphine to Quick Ideal for trainer Joseph Berry. The 1981 ledger further indicates that on February 9, 1981 the horse, Miracle Blend, trained by Joseph Berry was given an injection. The narcotics ledger establishes that both these injections were given to said horses and were in fact injections of the drug, Apomorphine.

The Assistant Attorney General in his brief states that Appellant presented no evidence in his own behalf. It is noted that the Appellant, Joseph Berry, did not testify. No explanation was given for the presence of the drug, Apomorphine, in the bodies of these horses on the dates they raced. The attorney for the Appellant, Mr. Gerald Thurswell, raised questions concerning security and ability to protect the horse by cross-examining witnesses at the hearing, and in his brief filed in this matter sets forth Mr. Berry's innocence; however, Mr. Berry's personal denial was not made a part of this record.

Conclusions of Law

It having been found that the drug, Apomorphine, was present in the bodies of the horses, Quick Ideal and Miracle Blend, at the time they participated in a race, and it is hereby concluded that violations of the Racing Law of 1980 and the State of Michigan, Office of the Racing Commissioner, Rule 431.62(b) occurred.

The Appellant argues that the testimony did not establish that Apomorphine is a drug prohibited by Rule 431.62(b), stating that there was no testimony that Apomorphine is a "drug" within the definition set forth in Rule 431.62(b)(2)(a). In deciding whether or not Apomorphine fits within Rule 431.62(b) the intent of the statute must first be reviewed. Rule 431.62(b)(1) states as follows:

> "The intent of this rule is to protect the integrity of horse racing, to safeguard the health of the horse and to protect the interest of the general public and the racing participants through the *prohibition or control of drugs and medications which could affect the racing condition or performance of a horse.*" (Emphasis added)

It is clear that drugs, as later defined in the Regulation, and *medications* are either prohibited or controlled. The Regulation does not provide for the use of a medication which is not designated a controlled medication. It is clear that Apomorphine is not a "controlled medication" under Rule 431.62(b). Therefore, if in fact Apomorphine is not within the definition of drug under said rule, then Apomorphine is a medication, not a "controlled medication" under the rule and thus prohibited.

However, in this case it is found that Apomorphine is a drug under the definition set forth in Rule 431.62(b)(2)(a) for it has been found that Apomorphine is a stimulant, *which stimulates the nervous system of a horse and could affect the racing condition of a horse.* Additionally, the Racing Law of 1980, MCLA 431.83, prohibits drugs and defines them as follows:

> "(1) A drug or pain killer that is a stimulant to a horse or depressant to a horse shall not be administered to a horse

or be present in a horse that is intended to be entered, is entered, or participates in a race with wagering by pari-mutuel methods. Any drug, other than a stimulant or depressant, may be administered to a horse that is intended to be entered, is entered, or participates in a race with wagering by pari-mutuel methods only when authorized by the racing commissioner for use in the care of treatment of the horse.

(3) As used in this section, 'drug' means any of the following:

(a) A substance recognized or for which the standards or specifications are prescribed in the United States pharmacopoeia-national formulary, homeopathic pharmacopoeia of the United States, or any supplements.

(b) A substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals.

(c) A substance, other than food, intended to affect the structure or any function of the body of humans or other animals.

(d) A substance intended for use as a component of a substance specified in subdivision (a), (b), or (c).''

Therefore, it is concluded that Apomorphine is a locomotor stimulant which acts through the nervous system and is prohibited by both Rule 431.62(b) and MCLA 431.83.

It having been found that Apomorphine is a prohibited drug, its presence in the body of a horse at the time of a race is prohibited. It is further found that the Stewards were within

their authority in finding Joseph M. Berry, the trainer of the two horses, in violation of the trainer's responsibility rule as contained in Rule 431.62(b) and in MCLA 431.71(4). These provisions state that Mr. Berry, the trainer of these two horses, is "responsible for and the absolute insurer of the condition of the horses entered to race." As a result of that violation, Mr. Berry is subject to disciplinary action by the Stewards.

Appellant argued at the hearing and in his brief that the absolute insurer's rule is unconstitutional. The Office of the Racing Commissioner, an administrative body, when hearing and deciding an Appeal by a licensee is acting in a quasi-judicial capacity. The Office of the Racing Commissioner cannot and must not legislate or act in the capacity of the judiciary by deciding questions concerning the constitutionality of statutes or rules promulgated pursuant to statute. The Constitution of the State of Michigan states:

> "The powers of the government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const. 1963, Article 3, §2.

The Office of the Racing Commissioner, pursuant to the Administrative Procedures Act has the power to conduct contested cases involving licensees. This power is solely limited by the A.P.A. and the Constitution does not specifically authorize the Office of the Racing Commissioner to determine the constitutionality of statutes or rules. Therefore, it is concluded that this Hearing Officer and the Office of the Racing Commissioner are bound by the statutes and the rules governing horse racing in the State of Michigan.

Appellant argues that the "absolute insurer rule" punishes innocent trainers who have no knowledge of the administration of a drug. However, Rule 431.62(b)(7) states:

> "(7) The trainer shall be responsible for and be the absolute insurer of the condition of the horses entered for his stable regardless of the acts of third parties except as provided in R 431.10(84) in part 1."

Even though a violation under Section 7 is established solely by showing a positive analysis for a drug, all decisions concerning disciplinary actions are discretionary. Therefore, a contested case under the Administrative Procedures Act is meaningful in that it allows an appellant to explain the circumstances, deny any participation or improper conduct and allows this evidence to mitigate the severity of the penalty levied including whether or not a penalty should be levied at all. Therefore, an Appellant trainer is not without relief under Rule 431.62(b).

As set forth above, the disciplinary decision by the Stewards is discretionary. The rules do not contain a maximum or minimum number of days for suspending the person found in violation of this rule. The Stewards indicated that based upon the type of drug used, a stimulant, and the fraud perpetrated on the betting public and the other participants in the race, they agreed to a 365 day suspension for each positive test. The record establishes that the Stewards relied solely on the trainer's insurer rule, Rule 431.62(7) and MCLA 431.71(4) in suspending Mr. Berry. The record contains no facts which would indicate Mr. Berry administered or conspired to administer the Apomorphine. However, the record does show he instructed a veterinarian to "break the horses loose" prior to the positive tests and *two* horses tested positive rather than an isolated positive finding for Apomorphine. Furthermore, Mr. Berry did not testify at the hearing. He did not personally

deny administration of the drug, Apomorphine, nor provide any explanation for its presence. In the State of Michigan the failure of a party to testify raises an inference that the testimony would be adverse to his position. The Michigan Standard Jury Instructions, 5.01, sets forth that law. Therefore, some adverse inference is given to Mr. Berry's failure to testify. Considered in light of Dr. Woolpert's failure to testify and the ledgers indicating Apomorphine was given to these horses on at least one occasion, the violation and suspension relying on the insurer's rule is supported.

The horse racing industry has a strong interest in protecting its integrity. That interest is adversely affected by the administration of drugs to horses prior to a race. The State has a strong interest in protecting the integrity, and relies upon the absolute insurer's rule to take disciplinary action against the trainer of these horses and deter drugging. If the State were required to prove a trainer actually administered a drug which is found in the body of the horse subsequent to a race, there would be very few suspensions levied, for the State would have a burden of proof which could not be met. The insurer's rule relieves the State from this burden and protects the significant State interest involved. It is obvious that the insurer's rule does adversely effect the rights of a trainer to whom the burden is shifted. However, in the State of Michigan the legislature had found sufficient reasons to protect the integrity of sport by imposing a burden upon the licensee trainers under the insurer's rule.

It is assumed that Mr. Berry is also appealing the Order of the Stewards requiring the return of any purse money earned. Rule 431.62(b)(8) states:

> "The owner of the horse shall not participate in the purse distribution of that race and the horse shall be declared

> unplaced for every purpose except for pari-mutuel wagering."

In this case the horse, Quick Ideal, finished first with Apomorphine present in its body. It is concluded that the taking of the purse money is necessary, specifically to protect the other participants in the race. The horse raced with the presence of Apomorphine, a stimulant which could affect the speed of that horse, and irregardless of how or by whom that drug was placed into the body of the horse it would be totally unfair to the other participants to allow the horse to remain placed and receive the purse money. Further, to allow the owner to participate in the purse distribution would act as an incentive, rather than prohibition to drug or medicate a horse without the knowledge of the trainer. Therefore, it is concluded as a matter of law that the horse be unplaced for the purposes of the purse and that purse be distributed in accordance with the amended order of finish.

During the hearing it was disclosed that at the Stewards' Hearing, Mr. Berry was denied the effective use of counsel. He was told his counsel could appear but not participate in the hearing proceedings. Rule 316 of the Rules and Regulations Governing Harness Racing state:

> "Any applicant or licensee *at any hearing* may be represented by counsel and may present evidence in his own behalf."

Fairness and due process requires that if desired, a licensee be represented by an attorney at the Stewards' hearing. The Stewards' hearing is a significant step in the administrative process and a licensee has a right to be advised, guided and represented by an attorney. The Stewards wrongfully deprived Mr. Berry of that right. However, it is found that that denial is harmless in regard to this record. A partial transcript

of that hearing was not admitted into the record and is not being considered by the Hearing Officer in these findings. Pursuant to the A.P.A., Mr. Berry was entitled to a de novo hearing at the agency level and therefore is not deprived of due process rights having had a full opportunity to present witnesses and be heard. However, the Stewards should allow licensees to be represented by counsel of their choice at forthcoming hearings.

As previously cited the Stewards have discretion in imposing the penalty. In this case, they chose to impose a 365 day suspension for each violation. The record reflected that 365 days have been imposed on all recent suspensions dealing with stimulants. The Stewards' reasoning is that the use of a stimulant is a severe violation and perpetrates a fraud on the betting public and the racing participants. That penalty being systematically imposed, it is found that the 365 days is not arbitrary. Appellant argues that the penalty imposed is capricious. However, the hearing record reflects that the judges deliberated the penalty and found that the 365 days was a just penalty and is hereby found to be reasonable. Appellant also argues that all Stewards' decisions are affirmed by the Office of the Racing Commissioner, however, that argument is not supported by evidence in the record and therefore will not be considered in this Opinion. Therefore, it is concluded, after a full review of the record and applicable law, that the penalty imposed upon Mr. Berry is reasonable and should be affirmed.

/s/ DAVID G. JOHNSON

David G. Johnson
Hearing Officer

Dated: April 2, 1981

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

TERRY MERRIMAN,
Plaintiff,

-vs- 80 045 345 CZ

STATE OF MICHIGAN, OFFICE OF THE RACING COMMISSION,
Defendant.

OPINION AND DECISION RE PETITION FOR REVIEW OF ADMINISTRATIVE DECISION

This matter comes before this court in the nature of an appeal from a decision of the Racing Commission which was entered by virtue of an Order dated March 31, 1981, affirming the decision of the Stewards which had been entered on November 29, 1980.

Each party has submitted briefs in addition to the oral argument the Court had on the plaintiff's petition for a temporary restraining order. The plaintiff, in addition to his original brief, has also filed a reply brief to the brief of respondent.

The facts surrounding this case and the proceedings leading up to and including this appeal, are substantially not in dispute. It appears that a horse, Timely Waverly, trained by Mr. Merriman, participated in the Sixth Race on November 10, 1980, with a prohibited drug, caffeine, being present in the body of the horse. This fact was ascertained based upon a positive urine sample taken immediately after said race. On November 29, 1980, the Stewards ruled that Terry Merriman

be suspended from all tracks licensed by the State of Michigan for a period of 365 days.

This decision of the Stewards was appealed and the matter was heard by David G. Johnson, Hearing Officer for the Racing Commission who, in an opinion dated February 12, 1981, recommended that the 365-days suspension imposed by the Stewards be reviewed by the Racing Commission. Specifically, the Hearing Officer concluded that Terry Merriman was in violation of the State of Michigan, Office of the Racing Commissioner, rules and regulation governing horse racing, Rule 431.62 (b), (4), (5), (6), (7) and (8).

It is specifically the above-mentioned rule upon which the plaintiff, Terry Merriman, bases his appeal. These rules are termed the "Insurer's Rule", which provides that the trainer shall be responsible for and be the absolute insurer of the condition of the horses entered for his stable regardless of the acts of third parties. . . The appellant originally raised the issue of the constitutinality of the "Insurer's Rule" before the Hearing Officer, but there was no decision or opinion by the Hearing Officer on the merits of its constitutionality inasmuch as the Hearing Officer indicated that his power is limited by the A.P.A. and that the office of the Racing Commissioner is not authorized to determine the constitutionality of rules or statutes, that being a function of the judicial branch of government. With this conclusion the Court agrees.

The well-written briefs of the respective parties concede that there is some split of authority in this country as to the constitutionality of this so-called "Insurer's Rule." Both sides admit that the weight of authority is on the side of sustaining the constitutionality of the "Insurer's Rule." The mere weight of authority would not influence the Michigan Courts if the public policy of this State is better served by following the minority. Michigan very often has found itself in

the minority which eventually has become the majority view. Long before the case of *Gideon* v *Wainwright* guaranteed counsel to all indigent persons accused of crime in all the states of the United States, Michigan already was providing counsel to defendants who could not otherwise afford an attorney. Michigan Courts can be proud of the fact that it has always been a leader in the fight for personal liberty, equal protection, and due process.

It would be a simple matter to state that there is such a strong public interest in the integrity of horse racing that strict rules are required and, therefore, indicates that the conclusive presumption aspect of the rules of the Racing Commission are valid and within the exercise of the policy power of the state. This does not take into consideration the rights and protections that every individual is guaranteed by the United States and Michigan Constitutions.

The plaintiff sites the case of *Brennan* v *Illinois Racing Board*, 247 NE 2d 881 (1969), which drew into question a rule almost identical with the Michigan rule involved in this case. This Court is highly impressed with the reasoning in the Brennan case. The case concluded that any regulation which prevents a party from offering a defense to a charge brought against him by substituting an irrebuttable presumption would be "arbitrary, illegal, capricious and, hence, unconstitutional." This case recognizes that the principle behind the law in this country is that responsibility is personal and one should not be penalized by acts of another which acts are beyond the accused's control, knowledge or ability to prevent. The defendant argues that to impose the burden of proving fault would present an extremely difficult obstacle. This same sentiment could be expressed in criminal cases, and yet no one would argue that irrebuttable presumptions should ever be substituted for evidence when one is accused of a serious charge

where the penalty and consequenses would constitute a substantial deprivation of one's rights and property. While some of the cases cited by the respective parties talk about the rule being one of strict liability rather than an irrebuttable presumption, there is in actuality no real difference between the two. On the question of strict liability, this court can think of no criminal statute, or any statute which imposes fines, suspensions, etc., in which strict liability is imposed. Strict liability is well known in the field of torts where one who puts products into commerce may be strictly liable for any consequential injury caused by its product, but this is not in the nature of a criminal or quasi criminal matter.

This Court would hold that absolute insurer regulations violates the due process clause of the Fourteenth Amendment because they are a denial of one's rights and a deprivation of one's property without due process. They go beyond that which is necessary to protect the interests of the public at the expense of one who has not been proven by any weight to have violated any rule, regulation, law or statute. While the burden of proof imposed may be substantially lighter than "...beyond a reasonable doubt" and even be based on a mere preponderance of evidence, or some evidence, the public would be protected and individual rights would not be infringed upon. The State, which is a beneficiary of horse racing, has a duty to protect the rights and interests of all its citizens.

Apparently, the only case in which the United States Supreme Court was presented with an "Insurer's Rule" was *Barry* v *Barchi*, 443 US 55 (1979). In that case the court was confronted with New York's Trainer Responsibility Rule, however, it merely created a rebuttable presumption which allowed a trainer to offer evidence to show that he was not involved and thereby obviate any disciplinary action. In the instant case, while the respondent attempted to show that he was

not at fault by offering himself as a witness and other character witnesses to show that he was a trainer of impecable reputation, and no evidence of any kind was offered to indicate any complicity by the trainer, he was nevertheless "convicted." This Court will not rule upon the efficacy of the decision of the Commission regarding the lie detector test, however, in passing the court will note it was just another piece of evidence which the plaintiff attempted to present in his defense.

This case offers a clear presentation of the issue as to the constitutionality of the "Insurer's Rule" when we view the evidence which the Stewards used and the evidence at the hearing before the Hearing Officer. The evidence indicates clearly that the Stewards relied on the "Insurer's Rule" due to a lack of evidence as the actual administration of the drug. In fact, Mr. Greenley, the senior state steward, stated that the suspension was pursuant to the "Insurer's Rule." Mr. Greenley further indicated that his decision would probably be different if he knew who administered the caffeine other than Mr. Merriman and, additionally, Mr. Greenley acknowledged that he had known the plaintiff approximately two years and had no prior bad contacts with him and further that the reputation of the plaintiff has been good to the best of his knowledge. It is also interesting to note that no witness testified to any facts or circumstances which would in any way impugn the reputation of the plaintiff for honesty and integrity in his profession as a trainer.

There was also testimony that security at the track was very loose.

This Court would therefore come to the inescapable conclusion that at least as applied to the plaintiff, Terry Merriman, the rules of the Racing Commission known as the "Insurer's Rule" are unconstitutional in this case.

A judgment in accordance with the aforementioned findings may be presented.

/s/ CHARLES KAUFMAN

Circuit Judge of the
Third Judicial Circuit of Mich.

Dated: Detroit, Michigan
May 6, 1981

Office - Supreme Court, U.S.
FILED
JUN 30 1984
STEVAS
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No. 83-2046

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH BERRY
Appellant

vs.

MICHIGAN RACING COMMISSIONER
Appellee

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
(Counsel of Record)

Charles D. Hackney
Theodore S. Klimaszewski
Nelson W. Westrin
Assistant Attorneys General

Attorneys for Appellee
The Michigan Racing Commissioner

Dated: June 28, 1984

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COUNTERSTATEMENT OF QUESTION PRESENTED

May the State of Michigan, under its police power, impose strict liability as a condition of licensure on a trainer of horses involved in pari-mutuel racing by making the trainer the absolute insurer of the condition of horses he enters to race pursuant to MCL 431.71(4) and Michigan Administrative Code 1979 AACS R 431.62(b)(7)?

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No. 83-2046

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH BERRY

Appellant

vs.

MICHIGAN RACING COMMISSIONER

Appellee

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

Appellee, the Michigan Racing Commissioner, in accordance with Rule 16, moves the Court to dismiss the appeal herein, or, in the alternative, affirm the Judgment below for want of a substantial Federal question, and because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellee further moves the Court to dismiss the appeal, as it is not within the jurisdiction of this Court, since it was not pursued in conformity with 28 USC 1257(2), in that the decision appealed was not ". . . rendered by the highest Court of a State in which a decision could be had. . . ."

COUNTERSTATEMENT OF THE CASE

The Michigan Racing Commissioner, accepts Joseph Berry's statement of the case subject to the following additions and clarifications:

Joseph Berry was the trainer of "Quick Ideal" and "Miracle Blend", who participated in separate races held on February 7, 1981 and February 14, 1981, respectively, at Northville Downs, Northville, Michigan. Post race urinalysis of each horse revealed the presence of apomorphine which, when administered to horses, acts as a stimulant.

The Stewards at Northville Downs, following separate hearings, issued rulings on February 19, 1981 and February 26, 1981, wherein they suspended Joseph Berry for 365 days for each finding of apomorphine to run consecutively.

Joseph Berry appealed the Stewards' decisions, and a *de novo* appeal hearing was held on March 27, 1981. At the *de novo* hearing, Joseph Berry was represented by counsel. A hearing transcript was prepared and will be referred to as (HT-) followed by the page number.

Mr. Berry's counsel, during testimony offered by a track steward, Dana Taylor (HT-95, 96), objected to Mr. Taylor's recollection as to whether there was any testimony given at one of the Stewards' hearings which would shed light on why the horse came up with a positive test of apomorphine, and, as justification for the objection, stated that "Mr. Berry requested of the presiding steward at the hearing, Mr. (Richard) Rudnicki, if he could have an attorney participate in the proceedings, and he was advised your attorney can come but he has to keep his mouth shut. There was no sense for me to come there if I couldn't talk." Mr. Taylor stated (HT-102) that he did not tell Mr. Berry that he could not have an attorney present but he did justify what Mr. Rudnicki apparently told Mr. Berry by stating that ". . . his attorney could not participate in cross-examination." Also, "That we were not going to get into a court proceeding and have a shouting match and have it taken over like it was at Hazel Park" and "That you could come as an observer" (HT-101, 102).

Mr. Taylor, in justifying why Mr. Rudnicki apparently advised Mr. Berry that his attorney would have to be quiet, stated "This happened for a reason. We have had hearings where attorneys have been present, they get into a shouting match back and forth, a legal shouting match. We conduct hearings of fact finding." (HT-97).

Counsel for the Racing Commissioner, made reference to a hearing held August 17, 1979, regarding Mr. Berry, who was represented by the same counsel, and referred to a heated verbal debate that disrupted the hearing (HT-98). He attempted to read into the record some of the exchanges that went on between Mr. Berry's counsel and the opposing counsel (HT-101).

The two parties to this conversation, Mr. Berry and Mr. Rudnicki, did not testify as to their actual statements. Mr. Rudnicki testified at the hearing but was not examined regarding this incident (HT 181-185). Mr. Berry offered no testimony whatsoever.

The Court below examined this issue and concluded that the stewards clearly erred in suppressing counsel's participation at the Stewards' level, but, since Mr. Berry was subsequently afforded a full *de novo* hearing, with counsel present, the requisites of due process were thus complied with (Appellants' Appendix at 18a, hereafter "App").

Mr. Berry's suspensions were primarily based on Michigan Administrative Code 1979 AACS R 431.62(b)(7)(8) (App 4a, 5a) and MCL 431.71; MSA 18.966 (App 1a-3a), which provides that the trainer is responsible for and the absolute insurer of the condition of the horse he enters to race. The statute and rule are referred to as Michigan Insurer's Rule (hereinafter referred to as "MIR").

In addition to the MIR, one Steward, Dana Taylor, took into consideration the fact that Mr. Berry testified at one of the Stewards' hearings that he told his veterinarian that his horse "Miracle Blend" was sulking, it wasn't putting out, that he had liked for him to "break him loose" but had he known apomorphine was the drug, he would not have let the veterinarian use it (HT-113, 114).

Another Steward, Frank Utter, testified that in addition to the MIR he based his decision to suspend Mr. Berry on the fact that "by the direction of Mr. Berry, the veterinarian that was present at the hearing had administered this particular drug into the horse. . . ." (HT-166).

App 34a-35a, itemizes 20 exhibits that were admitted at the *de novo* appeal hearing held March 27, 1981.

Exhibit 18 is a log book for the year 1981 maintained by Mr. Berry's veterinarian, Dr. Oram Woolpert. An entry for the date of February 3, 1981, indicates that he administered apomorphine to Mr. Berry's horse "Quick Ideal." This entry is peculiar as it is made on the very first line of the page and it is quite apparent from a review of the entire log book that Dr. Woolpert normally leaves the first line clear and usually skips a line before making a new entry.

Mr. Woolpert was called as a witness (HT-85), and during direct examination on how he enters notations in his log book, Mr. Berry's counsel interrupted and suggested (HT-87) that someone should advise Dr. Woolpert of his constitutional rights and the right against self-incrimination. Mr. Berry's counsel, advised Dr. Woolpert (HT-90, 91) on the procedure to use if he wants to take the Fifth Amendment.

Dr. Woolpert subsequently (HT-90) utilized his Fifth Amendment privilege and refused to answer additional questions.

An entry on the log book for February 9, 1981, reveals that Dr. Woolpert injected apomorphine in "Miracle Blend" which was also trained by Mr. Berry.

Exhibit # 20 is a narcotics ledger maintained by Dr. Woolpert and it is maintained in alphabetical order. Under the page "b", Dr. Woolpert substantiates the fact that he administered apomorphine to horses for "J. Berry", specifically "Q Ideal" on February 3, 1981, and "Blend" on February 9, 1981.

ARGUMENT

I

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The State of Michigan may, under its police power, impose strict liability as a condition of licensure on a trainer by making him the absolute insurer of the condition of horses he enters in a pari-mutuel race.

Gambling on horse races is *malum prohibitum* and was legalized in Michigan by legislation that includes strict licensing, regulation and enforcement provisions such as the MIR.

The MIR was enacted for a valid purpose. It protects the betting public, jockeys, drivers and horses by insuring that the horses entered to race at state regulated pari-mutuel tracks are free from prohibited drugs that could defraud the bettors or cause horses to break down, thereby endangering lives of horses and participants.

Joseph Berry contends that the MIR violates the due process clauses of the U.S. Constitution by creating an irrebuttable

presumption of fault whereas the MIR, realistically, as a condition of licensure, imposes strict liability on the trainer by making him the insurer of the condition of horses he enters to race.

Black's Law Dictionary, 5th Edition, page 726 defines "insure" as "to make sure or secure, to guarantee, as, to insure safety to anyone". The MIR, as the name implies, makes the trainer the insurer of the horse's condition.

The trainer of race horses is the most important individual in racing, as he controls the horse's feeding, medication, training, security and selects drivers or jockeys. The trainer also hires employees such as assistant trainers, grooms and hot walkers, enters horses to race and arranges for transportation of horses.

In view of his responsibilities, the trainer is the most logical person to hold responsible for the condition of a horse at race time. Someone has to be responsible not only for the protection of the betting public, but also for the protection of the horse as it is inhumane to race a horse on a stimulant, depressant or painkiller.

The imposition of strict liability on the trainer is clearly and directly related to the State's effort to provide its citizens and race participants, honest and safe horse races. The MIR is reasonable and essential to the regulation of an industry wherein the danger of fraud and corruption is well recognized.

Strict liability, where the public welfare is concerned, has been upheld in numerous instances and is not incompatible to the due process clause of the Fourteenth Amendment especially where there is a clearly expressed legislative intent to impose such liability. *United States* v *Balint*, 258 US 250; 42 S Ct 301; 66 L Ed 604 (1922); *United States* v *Dotterweich*, 320

US 277; 64 S Ct 134; 88 L Ed 48 (1943) reh den 320 US 815 (1943); *Sandstrom* v *California Horse Racing Board*, 31 Cal 2d 401; 189 P2d 17, cert den, 335 US 814 (1948); *United States* v *Park*, 421 US 658; 95 S Ct 1903; 44 L Ed 2d 489 (1975).

The National Association of State Racing Commissioners publishes uniform rules for the guidance of State Racing Commissioners and their Rule No. 10.01 adopted in 1958 is as follows:

> "The trainer shall be responsible for and be the absolute insurer of the condition of the horses he enters regardless of the acts of third parties."

There are approximately 24 states that have significant pari-mutuel horse racing and all of them have a Trainer's Responsibility Rule. The majority have a rule similar to the MIR.

Courts that have held the "Absolute Insurer's Rule", such as the MIR, to be unconstitutional found that the rule creates an irrebuttable presumption of guilt and therefore violates due process. See *Brennan* v *Illinois Racing Commission*, 42 Ill 2d 352; 274 NE2d 881 (Ill 1969); *Mahoney* v *Byers*, 187 MD 81, 48, A2d 600 (Md 1946) and *State* v *Baldwin*, 159 Fla 165; 31 So2d 627 (Fla 1947).

The vast majority of courts that have addressed the constitutionality of the Insurer's Rule, similar to the MIR, have held that the rule is constitutional. E.g. *Solimena* v *State Dept of Business Regulation, etc.*, 402 So2d 1240; pet for rev den, 412 So2d 470 (Fla 1982); *Division of Pari-Mutuel Wagering, Dept of Business Regulation* v *Caple*, 362 So2d 1350, on remand; 363 So2d 416 (Fla 1978). *Dare* v *State*, 159 NJ Super 533; 388 A2d 984 (1978); *Fioravanti* v *State Racing Commission*, 6 Mass App 299; 375 NE2d 722 (Ma 1978); *O'Daniel* v *Ohio State Racing Commission*, 37 Ohio St 2d 87; 307 NE2d 529

(Ohio 1974); *Fogt* v *Ohio State Racing Commission*, 3 Ohio App 2d 423; 32 Ohio Ops 2d 546; 210 NE2d 730 (Ohio 1965); *Hodges* v *Alberta Racing Comm'n*, No. 14068 (Alberta, Can. Ct of App) (1982).

In *Solimena* v *State Dept of Business Regulation*, *supra*, the District Court of Appeals of Florida stated that

> "In our view, the absolute insurer rule reflects an appropriate legislative purpose: prevention of the influencing of race results by the use of drugs. Legalized gambling operates only by permission of the state. . . ."

The last previous test of Florida's absolute "Insurer's Rule" was in *Div of Pari-Mutuel Etc* v *Caple*, *supra*, wherein the Florida Supreme Court overruled its decision in *State* v *Baldwin*, *supra*.

In the *Caple* case, the Florida Supreme Court stated that *Baldwin*:

> ". . . did not consider the power of a state to impose strict liability, the existence of which is the fundamental basis of our determination. Also, it would appear that the decision in the *Baldwin* case was influenced decisively by analogy to *Mahoney* v. *Byers* . . . where the mechanics rested in the employment of a presumption as conclusive evidence. . . .
>
> '[I]t is not unreasonable, arbitrary or capricious to provide that the trainer guarantee the condition of a horse running in a race upon the results of which there is wagering.'"
> (Citation omitted)

The Supreme Court of Florida also referred to *Brennan v Illinois Racing Board, supra,* which was cited in Mr. Berry's brief and discussed in 74 Dickinson L. Rev. 303 (1970), n. "Brennan v. Illinois Racing Board; The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of his Horse". The Florida Court stated:

> "So far as we can determine, the Illinois Supreme Court is the only court that has held the absolute insurer rules unconstitutional since Baldwin . . . It is noteworthy, however, that in both Baldwin and in Brennan the prohibited drugs had in fact been administered to the horse by someone other than the trainer."

The Supreme Court of Florida concluded by stating that the Florida Division of Pari-Mutuel Wagering, Department of Business Regulation rule that makes the trainer the absolute insurer of the condition of his horse is a:

> ". . . reasonable means of eliminating or minimizing the possibility of illegal drugging, *by placing total responsibility on the person most capable of controlling the problem.*" (Emphasis added)

On page 13 of his Jurisdictional Statement, Mr. Berry cites a law review article "Brennan Revisited: Trainer's Responsibility for Race Horse Drugging", 70 Kentucky Law Journal, 1103, 1129 (1981-82) which states that a conscientious racing commission can maintain the integrity of racing, as many commissioners have demonstrated under a trainer responsibility rule based upon the fault and culpability of the trainer. In the same paragraph, the authors state that a trainer's responsibility rule that imposes either absolute liability or strict liability without proof of fault not only is consistent with long established legal precedent concerning public welfare regulation but also affords the public a maximum of protection against horse drugging.

The authors clearly cited various valid alternatives to drugging problems and it is for each legislature to decide what form their Trainer Responsibility rule should take.

The Michigan Court of Appeals was correct in its conclusion as to the constitutionality of the MIR when it stated that:

> " . . . the insurer rule constitutes a proper exercise of police power inasmuch as (1) it seeks to advance a valid public purpose and (2) it provides a remedy that is reasonably related to that public purpose. . . ." (App 14a)

Regardless of the fact that the MIR imposes strict liability on the trainer, all rulings by the stewards are discretionary.

Rule 431.62(b)(8) provides that:

> "If the chemical analysis of a sample indicates a presence of a drug or unreported controlled medication the trainer of the horse and any person shown to have the care or attendance of the horse or shown to have administered the drug . . . is subject to disciplinary action." (App 4a, 5A)

A trainer is given two opportunities to explain the circumstances and deny any participation of improper conduct. The first opportunity occurs at the Steward's hearing and the second at a *de novo* hearing appealing the Steward's ruling. These hearings allow evidence to modify severity of the penalty levied including whether or not a penalty should be levied.

At a *de novo* hearing held February 12, 1981, Donald L. McIlmurray, Sr. appealed a 60 day Michigan Stewards' suspension upon a finding that his horse raced on January 2, 1981 with procaine in its body. The testimony and evidence established that his 16 year old son, Donald L. McIlmurray, Jr. administered the medication. The Michigan Racing Commis-

sioner ordered that the decision of the stewards revoking McIlmurray's license be reduced by four days, that is, the period of time between the effective date of the stewards' ruling and the date the stay was granted by the Commissioner and further ordered that the remaining period of revocation be waived upon the payment of a $300.00 fine by McIlmurray, Sr. The Stewards subsequently held McIlmurray, Jr. responsible for the prohibited drug and ruled him off the grounds for the remainder of 1981.

Therefore, Mr. Berry was not without relief under the MIR; however, he did not testify and did not present any witnesses or present one scintilla of evidence that might shed some light on why apomorphine was administered to the horses under his control. If any evidence was presented, it certainly would have been considered.

II

APPEAL WAS NOT MADE IN ACCORDANCE WITH 28 USC § 1257(2)

In his notice of appeal, Joseph Berry appealed the Michigan Supreme Courts' Final Order of February 28, 1984 denying his Motion for Reconsideration of the Michigan Supreme Court's Order of September 21, 1983 denying his application for leave to appeal.

28 USC § 1257(2) requires that an appeal from a state court be by the highest court of a state in which a decision could be had. The Michigan Supreme Court did not decide the merits of Mr. Berry's case but merely denied leave to appeal and motion for reconsideration.

Therefore there is no jurisdiction under 28 USC 1257(2) and Mr. Berry's appeal should be dismissed as the Michigan Court of Appeals was the highest court of the state in which a decision could be had. *Michigan-Wisconsin Pipe Line Co* v *Calvert*, 347 US 157 (1954); Levy, Herbert Monte, "How to Handle An Appeal" (Practicing Law Institute Ed 1968), Ch 12, p 1209; *Siegel* v *Association of the Bar of the City of New York*, 5 NY2d 707, 708; 179 NYS2d 1029 (NY 1958), cert den, 359 US 552 (1959).

CONCLUSION

Mr. Berry's appeal should be dismissed or affirmed for failure to present a substantial federal question, because the lower court's decision was correct and because jurisdiction is lacking.

Respectfully submitted

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Charles D. Hackney
Theodore S. Klimaszewski
Nelson W. Westrin
Assistant Attorneys General

Agriculture & Lottery Division
Plaza One Building, Suite One
Lansing, Michigan 48913

Dated: June 28, 1984